No: 17-16838

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE AGUA CALIENTE TRIBE OF CUPEÑO INDIANS
OF THE PALA RESERVATION,
Plaintiff and Appellant,

vs.

MICHAEL BLACK, Acting Assistant Secretary of Indian Affairs, United States Department of the Interior (in his official capacity) and DOES 1 through 10, inclusive
Defendant and Appellee

Appeal from the United States District Court for the
Eastern District of California
Civil Case No. 2:15-cv-02329-JAM-KJN
(Honorable John A. Mendez)

APPELLANT THE AGUA CALIENTE TRIBE OF CUPEÑO INDIANS OF THE PALA RESERVATION'S OPENING BRIEF

Andrew W. Twietmeyer, SBN 254436
THE LAW OFFICE OF ANDREW W. TWIETMEYER
10537 Santa Monica Blvd., Suite 240
Los Angeles, CA 90025
Tel: 310-909-7138
Fax: 323-375-1123
awt@twietmeyerlaw.com

Attorney for Plaintiff and Appellant
THE AGUA CALIENTE TRIBE OF CUPEÑO INDIANS
OF THE PALA RESERVATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Federal Rules

Federal Register

Congressional Materials

Treatises

I. JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this case under 28 U.S.C. § 1361 and 5 U.S.C. § 706(1)-(2) because Plaintiff seeks an order holding Defendant's final determination in this case to be unlawful, setting that determination aside, and compelling Defendant to correct the List of Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs (hereinafter, the "List"). 28 U.S.C. § 1361; 5 U.S.C. § 706(2); *See Independence Min. Co., Inc. v. Babbitt*, 105 F.3d 502, 505, 507 (9th Cir. 1997).

This Court has jurisdiction under 28 U.S.C. § 1291 because the appeal is from the District Court's order granting Defendant's Motion for Summary Judgment—which disposes of all parties' claims. *See Independence, supra*, 105 F.3d at 505.

This appeal is timely under FRAP 4(a)(1)(B) because Defendant is an officer of the United States sued in his official capacity; the Judgment dismissing Plaintiff's case was entered on August 2, 2017, ER41;[1] and Plaintiff filed its Notice of Appeal on September 6, 2017—less than sixty days after the entry of judgment. ER42.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE ONE: Did the District Court wrongly hold that no law requires

[1] Cites to Excerpts of Record page 41.

Defendant to correct the List when he is presented with facts showing that an un-Listed tribe was federally recognized, and that the tribe's federal relationship has never lapsed or terminated? ER19:16-ER20:2.[2]

ISSUE TWO: Did the District Court wrongly hold that Plaintiff must exhaust the procedure for petitioning for federal recognition found at Title 25, Part 83 of the Code of Federal Regulations, and that, until exhausting that procedure, this case presents a nonjudiciable political question? ER17:19-ER18:22; ER19:3-22; ER25:9-ER26:2; ER26:22-ER27:13; ER28:6-ER30:9; ER31:3-12; ER34:16-25; ER36:4-ER37:12; ER37:22-ER38:3.

ISSUE THREE: Did the District Court wrongly hold that Defendant provided a rational basis for treating the Cupeño differently from three other tribes that were added to the List outside of the Part 83 process in 1995, 2000, and 2012? ER20:9-ER21:16, ER31:13-18; ER32:10-ER33:14.

This Court should review all of the above issues *de novo*. *See Beno v. Shalala*, 30 F.3d 1057, 1063 n.9 (9th Cir. 1994).

III. STATEMENT OF THE CASE

A. The Cupeño and the Pala Luiseño Form Separate Federal Relationships.

The Agua Caliente Tribe of Cupeño Indians of the Pala Reservation (the

[2] Cites to Excerpts of Record page 19, line 16 through page 20, line 2

"Cupeño") is an Indian Tribe from the village of *kúpa* or "Agua Caliente Village" at Warner's Hot Springs, California. *See* ER128; ER135. Since 1852, the Bureau of Indian Affairs ("BIA") has referred to the Cupeño in various records as "Agua Caliente (Warner's ranch)," *see* ER138; "Agua Caliente (Warner's) Reservation," *see* ER139; "Agua Caliente No. 1," *see* ER141, ER145; "the Cupa," *see* ER148-149; "the Warners Ranch Indians," *see* ER151, ER146; *see* "The Agua Caliente 'Warner'", *see* ER158; and even mistakenly as "Agua Caliente No.2." *See* ER164.[3]

The Pala Band of Luiseno Mission Indians of the Pala Reservation, California (the "Pala Luiseño") is a culturally and linguistically distinct band of Luiseño Indians historically living in the Pala Valley. ER627¶11 & ER655¶11; ER627¶18 & ER656¶18; *see also* ER628¶19 & ER656¶19.

In 1851, a group of Cupeño Indians attacked a white settler's house giving rise to fears of an Indian uprising. *See* ER172-173. After quelling the outbreak, the United States negotiated the Temecula treaty with the Cupeño and other Indian tribes. Jose Noca (Chan-gah-lang-ish) signed the Temecula treaty for the Cupeño, and Pablino (Coo-hac-ish) signed for the Pala Luiseño. *See* ER180-183. Twenty-six others signed the treaty for other Indian groups, including several groups that are presently on the List. *See id.*; *compare* 81 Fed. Reg. 5,019 (Jan. 29, 2016),

[3] Agua Caliente No. 2 was the name used for an unrelated reservation located near Palm Springs. *See*, ER139.

ER185-186 (both Listing the Augustine; the Cabazon; the Morongo; the Pauma; the Soboba; the La Jolla; and the Pechanga (formerly referred to as the "Temecula" *see* ER207.[4]

After signing the Temecula treaty, the United States provided farming tools, seeds, and military protection to the Cupeño at Agua Caliente *See* ER170-174, ER177-178; ER215-219; ER164. In 1865, BIA agents recommended that a reservation be made at Agua Caliente, so the Cupeño could remain there, and that Pala was a very desirable location for a reservation for the "San Luis Indians"—i.e., the Luiseño. ER220-221.

By an 1875 executive order, President Grant granted the Cupeño a reservation encompassing Agua Caliente, and granted another reservation at Pala for the Luiseño. *See* ER628¶22-23 & ER657¶22-23. The Pala grant is referred to in BIA records and among the Indians of the Pala reservations as "Old Pala." *See, e.g.*, ER223; ER225; ER227; ER229-230; ER233 & ER235. Five years later, President Hayes cancelled the Agua Caliente reservation. ER628¶25 & ER657¶25.

[4] Defendant's Answer avers that the Cupeño was one of fifteen signatories for the "San Luis Rey Tribe, one of three tribes" who signed the Treaty. ER628¶20. However, the face of Treaty identifies three "nations and *their tribes*, and each of them" as parties. ER181, Art. 3 (emphasis added). Plainly, the United States understood the "San Luis Rey Nation" to include 15 distinct tribes. The balance of the Administrative Record is consistent with that interpretation. *See, e.g.,* ER340-342 (Listing other signatories of the Temecula Treaty); *see also* ER141 (1895 BIA report identifying the Agua Caliente as "Cupenia" tribe and other Temecula Treaty tribes as "San Luciana" tribe).

However, in January 1888, the BIA reported that the Cupeño tribe was still residing at Agua Caliente, which was then, by far, the largest, most flourishing, and influential village on Warner's Ranch. *See* ER174; ER177; *see also* ER164. The United States was then providing Agua Caliente with a school and a teacher. *See* ER178.

In 1891, Congress passed "An Act for the Relief of the Mission Indians of the State of California." *See* 26 Stat. 712 (1891) (hereinafter the "Mission Indian Relief Act.") That Act authorized the Secretary of the Interior to issue 25-year patents to southern California tribes for the lands they occupied and which were not subject to conflicting confirmed private grants. *See id.* Pursuant to that Act, in 1893, the United States patented to the "Pala Band or Village of Indians" a parcel almost identical to the 1875 grant comprising Old Pala. *See* ER238 *compare* ER241.

In 1893, the owner of Warner's Ranch sought to quiet title to the ranch and evict the Indians living there. ER163. From 1897 to 1901, the United States litigated on behalf of the Indians. *See* ER163; ER175-177. While that case was working its way to the Supreme Court, the United States continued to track the Cupeño by census. *See* ER158. Ultimately the owner prevailed in evicting the Indians. *See Barker v. Harvey*, 181 U.S. 481 (1901).

In January 1902, the Department of the Interior ("DOI") reported to the

House of Representatives on "the necessity for providing a home" for the Warner's Ranch Indians. ER161. The report detailed the BIA's investigation of numerous tracts of Southern California land to which the Indians could be relocated. *See e.g.,* ER165-167. On May 27, 1902, Congress passed, and President Roosevelt signed, 32 Stat. 257. It adopted language from the 1902 report's proposal, allocated $100,000.00, and authorized the Secretary of the Interior to purchase land and relocate the Warner's Ranch Indians and "such other Mission Indians as may not be provided with suitable lands elsewhere, as the Secretary of the Interior may see fit…." *See* ER247. Pursuant to 32 Stat. 257, the BIA created the Warner's Ranch Indian Commission and tasked it with locating suitable lands for the Indians. ER629¶33 & ER660¶33; ER248; ER146. After an extensive search, the Commission selected a tract of land adjacent to Old Pala. ER627¶16 & ER656¶16; *see also* ER250-256 (Deed for land purchase). The Cupeño was removed from Agua Caliente to that tract of land (hereinafter "New Pala"). *See* ER629¶34 & ER660¶34.

After removing the Cupeño to New Pala, the United States continued identifying the Cupeño as a distinct tribe and administered discrete services to the Cupeño. *See* ER155; ER259-260; ER264; ER268; ER225; ER270-274; ER579-587. For their part, the Cupeño, "show[ed] no desire or intention to affiliate with the resident local Indians,…." *See* ER264-265. By 1905, more than half of the San

Felipe Digueno Indians (who were removed to New Pala in the same year as the Cupeño) had left because they were culturally and linguistically distinct from the Cupeño and the two groups shared a history of animosity. *See* ER290.

During the ensuing decades, the Cupeño and the Pala Luiseño resided alongside each other. *See* ER630¶38 & ER661¶38. BIA records memorialize discord between the two groups as to which tribe or tribes had rights to New Pala. Apparently, the federal government provided no clear instruction as to that tension. *See* ER293 (June 1928 BIA agent stating, "My impression is that the land at Pala was purchased for the Warner Hot Springs band, and that only members of the same can be allotted at Pala.").

In 1934, Congress passed the Indian Reorganization Act (the "IRA") *See* 48 Stat. 984 (1934) currently codified as amended at 25 U.S.C. §§ 5101 to 5129. The IRA "authorize[d] the members of a tribe (or a group of tribes located upon the same reservation) to organize as a tribe…." ER296. A practical effect of the IRA "was the creation of new 'tribes' where none previously existed." ER297. The IRA does "not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 25 U.S.C. § 5125.

In 1934, despite the fact that *two* reservations existed at Pala, the Secretary of the Interior called a single election at Pala, to accept or reject the IRA. ER630¶42

& ER661¶42. The Indians voted 66 to 7 *to reject* the IRA. ER630¶43 & ER661¶43. Therefore, the IRA has never applied at Pala. *See* 25 U.S.C. § 5125; *see also United States v. Anderson*, 625 F.2d 910, 916 (9th Cir. 1980). In the following decades, despite living alongside each other, the Cupeño and Pala Luiseño acted as separate tribes. *See* ER229-230; ER304-305. Friction persisted between the two groups as to their respective rights to New Pala. *See* ER307. When the BIA was confronted with that friction in 1955 and 1957, it responded by telling the Indians, "It is true that the land included in the Pala Reservation was acquired at different times under different conditions. However, it is all considered as one reservation and no distinction is made between the lands acquired at different times." *See* ER309-311; ER227.

The BIA was aware of the distinction between the Cupeño and Pala Luiseño, and their reservations, because a few years earlier it had cooperated with Congress to investigate the United States' government-to-government relations with Indian tribes—with the intent of terminating those relationships. *See* ER192-193. The result of that investigation was House Report 2503. ER188-211. The 1593-page report includes an alphabetized list of "Indian Tribal and Band Groups." *See id.* ER194-197. That list includes the following two entries:

> *Cupeño* Formerly occupants of the village of Cupa, they are now mainly on Pala Mission, San Diego County, Calif. They are probably Shoshonean stock and related to Luiseño.

> *Luiseño or San Luiseño* A Shoshonean group in western Riverside and northwestern San Diego Counties, Calif. The group is now located on several small mission areas of southern California, namely, La Jolla, Pala, Pauma and Yuima, Pechanga, Rinçon, San Manuel, San Pasqual and Soboba.

ER195; ER197 (italics original).

Part II of the Report has a List of Tribes and Reservations spanning 313 pages. *See* ER190-191 & ER201. Each tribe is listed in italicized, all-capitals. The list includes the "*CUPEÑO INDIANS*" and notes that the Cupeño is on the Pala Reservation. That entry is cross-referenced, "*See* Mission Indians, Pala Reservation." ER202. Under the heading for the tribe "*MISSION INDIANS,*" the House Report contains entries for each "*MISSION INDIAN*" reservation. It contains an entry for "*Pala," see* ER206-207, and *another entry* reading "*Warners Ranch, Calif. See above* Pala Reservation." *Id.* at ER208. The Report *does not* identify a tribe of "*PALA INDIANS.*"

B. The BIA Counsels the Indians at Old and New Pala to Form the PBMI.

In November 1957, the BIA responded to an inquiry from the Indians at Pala regarding adoptions proposing, "as a general policy that there be no approval of adoptions into tribes or bands until, or unless, they are organized and have a constitution which sets forth membership requirements and adoption procedures." *See* ER313. Pursuant to the BIA's instructions, *see* ER315, and after the BIA's repeated representations that all of the Indians at Pala had exactly the same rights to

a single reservation, in 1959 the Cupeño, the Pala Luiseño, and other Indians in the Pala Valley adopted Articles of Association to create an association called the Pala Band of Mission Indians (hereinafter the "PBMI"). ER631¶51 & ER662¶51. The BIA approved the PBMI Articles of Association in 1960. ER631¶52 & ER663¶52. That happened shortly before the PBMI entered a sand and gravel contract under the BIA's approval. *See* ER317-318. The Articles thus coincide with the first major economic activity at Pala. *See id.*; ER588-624; ER631¶52 & ER663¶52. The Articles do not express any intent to create a new tribe. ER556-578.

Under the Articles, membership in the PBMI was not based on proof of an individual's blood degree of any Tribe. *See* ER557 (Art. 2); *compare* ER632¶58 & ER664¶58. Instead, membership was based on an individual's lineal descent from an *Indian allottee* whose name appears on the Pala allotment rolls approved by the Secretary of the Interior in 1895 (for Old Pala) and 1913 (for New Pala). *See id.*; ER632¶56 & ER663¶56. Thus, Article 2(A)(2)'s reference to "Indian blood of the Band" means Indian blood of an allottee. *See* ER557. Plaintiff alleges and believes that membership based on Indian *allottee* blood rather than blood of any *tribe* was necessary because the PBMI was formed among Indians of various tribes and bands. *See* ER638¶111 & ER673¶111. Moreover, the formation of the PBMI immediately before the exploitation of sand and gravel assets at Pala indicates that PBMI membership was crafted to ensure that all allottees and their descendants

(and *only* such individuals) benefited from the assets. *See* ER317 (BIA correspondence advising that any agreement for sale of sand and gravel assets is subject to BIA approval in its capacity as trustee); *see also, Manchester Band of Pomo Indians, Inc. v. United States,* 363 F. Supp. 1238, 1245 (N.D. Cal. 1973) (United States has fiduciary duty to administer trust assets solely in the interest of the beneficiary.) In other words, the PBMI was formed primarily to protect the trust interests of individual allottees. Thus, Plaintiff alleges and believes the choice of the term "Band" rather than "Tribe" was deliberate. *See Conners v. U.S.*, 180 U.S. 271, 275 (1901) (The word 'band' implies an inferior and less permanent organization than 'tribe.')

After the PBMI was formed, the United States continued to show awareness of the distinct tribes at Old and New Pala. As late as 1961, it was still recording allotments identifying individuals as members of the "Cupa" tribe. *See* ER149; *compare* ER223; ER235 (certificates and patents designated "Old Pala."); *see also* ER155 (recommending land be taken into trust for "Warner's Ranch Indians" and other groups at Pala in 1968); *see also* ER324-338 (tracking services administered to the "Cupeno" apart from the "Luiseno" and noting two reservations "Warner's Ranch (Pala)" and "Pala" in 1969).

C. The BIA Lists the Pala Luiseño, but Not the Cupeño.

In 1979, the BIA published its first Federal Register List. *See* ER340-342;

see also 25 CFR § 54.6(b)(1979). The BIA did not List either the Cupeño or the PBMI, but it did List the "Pala Band of *Luiseno* Mission Indians, Pala Reservation, California" (emphasis added.) *See* ER341. Fifteen years later, Congress passed the Federally Recognized Tribes List Act Pub.L.No. 103-454, 108 Stat. 4791; codified at 25 U.S.C. §§ 5130 to 5131 (the "FRTLA"). The FRTLA mandated that the BIA keep an accurate and complete List. The BIA did not List the Cupeño or the PBMI at that time, but continued to List the Pala Luiseño. *See* 60 Fed. Reg. 9,250 – 9,255 (Feb. 16, 1995).

In 1994, PBMI Chairman Robert Smith submitted a PBMI Constitution to the BIA for review and approval. On July 25, 2000, the BIA approved the PBMI Constitution. ER636¶89 & ER669¶89; ER344-345. The PBMI Constitution does not purport to terminate the Cupeño, nor does it provide that the Cupeño relinquishes its identity as a federally-recognized tribe. *See* ER347-360; ER636¶90. The PBMI Constitution defines membership based on lineal descent and blood quantum of the same individual Indian allottees as the Articles of Association. ER636¶92.

Thereafter, the United States continued to exhibit its awareness of the Cupeño as a distinct tribe from the Pala Luiseño. In 2008, it identified the Cupeño apart from the Pala Luiseño, six other federally-recognized tribes, and one *"non-federally recognized Indian group"* in a Federal Register Notice directing the San

Diego Archaeological Center to provide notice to "the Cupeno (Cupa, Kuupangaxwichem) Nation of the Pala Reservation, California" of items found at an archaeological site. *See* 73 Fed. Reg. 59,651 (Oct. 9, 2008). ER364. It has also continued to track Cupeño and Pala Luiseño population separately through the most recent national census in 2010 *See* ER635¶80 & ER667¶80; ER367-368.

D. The Cupeño Adopts a Constitution and Requests Correction of the List.

Margarita Britten (sometimes misspelled "Brittain") lived at Agua Caliente Village at the time of the June 1897 census. ER159. In 1989, the BIA made a final determination that Margarita Britten was a full-blood "Cupa" Indian. *See* ER370-371. In 2012, the PBMI Executive Committee revised Ms. Britten's blood quantum from 4/4 Cupeño blood to only 1/2. *See id.*; ER374; ER385-387. Based on that revision, the PBMI Executive Committee dis-enrolled 170 of Ms. Britten's descendants. *See generally, Allen v. Smith*, 2013 U.S. Dist. LEXIS 35046 (S.D. Cal Mar. 11, 2013). After the dis-enrollments in 2012, the BIA reiterated its position that Ms. Britten was a full-blooded "Cupa Indian," and recommended re-enrollment of her descendants on that basis. *See* ER387.

The PBMI Executive Committee's revision of established history demonstrated to Plaintiff that the PBMI is broken and no longer serves the Cupeño. *See* ER375; ER389-390. The PBMI has never had authority to dis-enroll anyone from the Cupeño tribe under the Articles or the PBMI Constitution. ER347-360 &

ER556-578. Cupeño membership is exclusively for the Cupeño to determine. *See Santa Clara Pueblo*, 436 U.S. 49, 72 n.32. (1978).

Thus, on August 23, 2014, the Cupeño resolved to withdraw from the PBMI and thereby disassociate from the Pala Luiseño. *See* ER389-392. On December 20, 2014, the Cupeño adopted a Constitution. *See* ER519-555. On December 23, 2014, Plaintiff, through its Attorney Andrew Twietmeyer, sent notice to Assistant Secretary for Indian Affairs ("AS-IA") Defendant Kevin Washburn of the Cupeño's Constitution. *See* ER394-398. That letter requested that Defendant correct the List. *See id.*

E. The PBMI Replaces the Pala Luiseño on the List by Way of a Purported Name Change

Commencing in 2011, the BIA began identifying Robert Smith as Chairman of the "Pala Band of ***Luiseño*** Mission Indians" (emphasis added) in the BIA's Tribal Leaders Directory, (the "TLD"). Prior to 2011, the TLD had always identified him as the chairman of the Pala Band of Mission Indians (i.e, the PBMI.) *See* ER380. On or about March 3, 2014, Pacific Regional Director Amy Dutschke issued a Notice of Decision addressed to "Honorable Robert Smith Chairman, Pala Band of *Luiseno* Mission Indians" (emphasis added.) *See* ER400. That Decision purports to grant the Pala Luiseño's purported application to have land taken into trust for the benefit of the Pala Luiseño. *See id.*

The stage having thus been set, in or about September, 2014, the PBMI

passed a resolution declaring that the Pala Band of Mission Indians' official name is "Pala Band of Mission Indians." ER638¶109; ER403. On May 14, 2015, BIA Tribal Government Officer, Harley Long, emailed the resolution to Division of Indian Services Chief, Laurel Iron Cloud. *See* ER405. Thus, with Long's assistance, the *PBMI*, submitted a *PBMI* resolution asking the BIA to change the *Pala Luiseño's* name to the *PBMI's* name on the List, and to "update" the TLD to identify Smith as Chairman of the *PBMI*—an "update" which was actually a reversion to the TLD's pre-2011 accurate form. *See id.*; *see also* ER381.

On June 16, 2015, Attorney Twietmeyer, sent a 20-page letter to Division Chief Iron Cloud and Defendant providing a detailed account with more than 220 pages of exhibits. ER639¶¶118-119 & ER674¶¶118-119. The letter requested that Defendant promptly confirm that the next List will include the Cupeño. *See* ER374-379; and ER382. Approximately two weeks later, on July 1, 2015, the BIA published newly revised 25 C.F.R. Part 83 regulations. ER639¶121 & ER674¶121. Defendant also published a "Policy Guidance" (the "July 2015 Policy Guidance") stating that the BIA "will no longer accept requests for acknowledgement outside the 25 C.F.R. Part 83 process." 80 Fed. Reg. 37,538 (July 1, 2015), ER412. On January 29, 2016, Defendant published the 2016 List replacing the name of the Pala Luiseño with the name of the PBMI. ER647¶192 & ER686¶192. The TLD has also been changed back to its pre-2011 form, identifying Smith as the leader of the

PBMI. *See* http://www.bia.gov/tribalmap/DataDotGovSamples/tld_map.html.

F. Plaintiff Files This Action.

Plaintiff filed this action in November 2015. *See* ER691. The original Complaint sought an order compelling Defendant to respond to Plaintiff's request to correct the List. *See* ER695¶207. In February 2016, Defendant finally responded to the Cupeño's request. ER647¶193-194 & ER686¶193-194. The parties thereafter stipulated that Plaintiff file an Amended Complaint. *See* ER700 (Dkt. 12 and 13.) Plaintiff filed the First Amended Complaint ("FAC") on March 8, 2016. *See* ER652. The FAC seeks an order that the Court reverse Defendant's decision. *See* ER690.

The District Court heard competing summary judgment motions on July 25, 2017. The District Court granted Defendant's Motion and dismissed Plaintiff's case holding that no law requires Defendant to correct the List; that Plaintiff must exhaust the Part 83 procedure; that until doing so, this case presents a nonjudiciable political question; and that the Defendant has provided a rational basis for disparately treating the Cupeño from three other tribes that were added to the List outside of Part 83. *See* Statement of Issues, *supra*.

IV. SUMMARY OF ARGUMENT

In at least three instances since 1994, the BIA has corrected the List to add a tribe outside of the Part 83 procedure. In each instance, the BIA determined that the

United States had recognized the un-Listed tribe at some point in the past; that Congress had never terminated the tribe; and that the tribe's federal relationship had not "lapsed." The BIA determined that Part 83 does not apply to a tribe whose federal relationship has not lapsed or been terminated. Accordingly, it simply reaffirmed the United States' federal relationship with each Tribe and added each Tribe to the List--characterizing those reaffirmations as *correction of administrative error*.

Those precedents provide judicially-reviewable factors for determining when a tribe is erroneously un-Listed. The Administrative Record and the law presented to the District Court in this case shows that the Cupeño became federally recognized in the nineteenth century and its federal relationship has never lapsed or been terminated. Accordingly, the Cupeño's absence from the List is also administrative error.

Plaintiff requested correction of the List. Defendant denied that request. His terse written decision did not even make a determination as to whether the Cupeño was ever federally recognized. Accordingly, his decision was wholly unreasoned, arbitrary, and capricious.

The District Court wrongly held that no law requires Defendant to correct the List. The plain language of the FRTLA requires him to keep an accurate and complete List. Even if the FRTLA were not clear, any ambiguity in the statute must

be construed to favor Plaintiff under the Indian cannons of construction. The BIA's past practice shows that it has always understood its legal obligation to correct the List when it is informed of error.

The District Court wrongly held that there is no administrative process for requesting correction of error, that therefore Plaintiff must exhaust the Part 83 procedure, and that the Political Question bars review of Defendant's decision unless Plaintiff exhausts Part 83. The Administrative record shows that Plaintiff requested correction the same way prior tribes have done so. The BIA's precedents and the text of Part 83 itself dictate that Part 83 does not apply to a tribe whose federal relationship has not lapsed or been terminated. No binding authority (including those the District Court cited) applies the Political Question doctrine to circumstances even superficially similar to this case. In fact, those authorities support Plaintiff's position that Defendant is bound to correct the List because of the BIA's prior precedents.

The District Court wrongly held that Defendant had a rational basis for refusing Plaintiff's request. Defendant merely quoted the 2015 Policy Guidance without any explanation as to its relevance. It is not relevant on its face. Defendant's attorneys have contradicted themselves when attempting to explain Defendant's implied reliance on that Policy Guidance. Moreover, Defendant's only *explicit* ground for denying Plaintiff's request is both factually and legally

unsupportable. His decision contends that the Cupeño withdrew from the PBMI—which he states is a federally recognized tribe—and that the Cupeño is therefore distinct from the three precedent tribes. But he provided no explanation as to why that purported distinction is legally relevant. Moreover, the facts and law show that the PBMI has never been a single federally recognized tribe. It was only ever an association that *included* the Cupeño and the Pala Luiseño.

Finally, Defendant's decision is irrational because it fails to adhere to the BIA's prior correction of error precedents because, in all legally-relevant respects, the Cupeño is similarly (indeed superiorly) situated to the other tribes that have been Listed outside Part 83.

V. LEGAL ARGUMENT

A. Standard of Review in APA Cases.

Under the APA, found at 5 U.S.C. § 551 *et. seq.* and 5 U.S.C. §§ 701 *et. seq.* an agency decision will be set aside if it is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (B) contrary to constitutional right, power, privilege, or immunity;…(D) without observance of procedure required by law;…." 5 U.S.C. § 706(2)(A). In reviewing an administrative action under the APA, "the function of the district court is to determine whether or not as a matter of law the evidence in the Record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d

766, 769 (9th Cir. 1985). In effect, the district court "sits as an appellate tribunal." *See Los Angeles v. Shalala, supra,* 192 F.3d at 1011.

"Review under the [APA's] arbitrary and capricious standard is narrow, and [the Court does] not substitute [its] judgment for that of the agency." *Cascadia Wildlands v. BIA*, 801 F.3d 1105, 1110 (9th Cir. 2015). Thus, the Court "may affirm based only on reasoning set forth by the agency itself" *See SEC v. Chenery Corp.,* 318 U.S. 80, 87 (1943). The Court may not embrace grounds for the action that are first advanced by Defendant's attorneys in this proceeding, nor may the Court formulate its own grounds for Defendant's action. *See id.* at 88, 92 (court review is confined to "a judgment upon the validity of the grounds upon which [Defendant himself] based [his] action"); *see also, Vitarelli v. Seaton*, 359 U.S. 535, 546 (1959) (Frankfurter, J., concurring) ("An executive agency must be rigorously held to the standards by which it professes its action to be judged"); *accord Philadelphia Gas Works v. F.E.R.C.*, 989 F.2d 1246, 1250 (D.C. Cir. 1993).

"Even in matters of agency expertise,…, the degree of deference a court should pay an agency's construction is affected by the thoroughness, validity, and consistency of the agency's reasoning." *Muwekma Ohlone Tribe v. Kempthorne*, 452 F.Supp.2d 105, 115 (D.D.C. 2006) (hereinafter "*Muwekma #2*"); *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). Under 5 U.S.C.

§ 706, the Court should reverse a decision as arbitrary and capricious if the agency, "failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Cascadia Wildlands, supra,* 801 F.3d at 1110. "Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action." *Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999); *accord Massachusetts v. E.P.A.*, 549 U.S. 497, 535 (2007).

In that regard, "agency action is arbitrary and capricious if it departs from agency precedent without explanation." *Ramaprakash v. F.A.A.*, 346 F.3d 1121, 1124 (D.C. Cir. 2003); *see also Muwekma #2, supra,* 452 F.Supp.2d at 115; ("the Equal Protection Clause and the APA prohibit agencies from treating similarly situated petitioners differently without providing a sufficiently reasoned justification for the disparate treatment.")

On appeal in APA cases, "a district court decision is 'generally accorded no particular deference,' and is reviewed *de novo* 'because the district Court is in no better position than this court to review the administrative record.' " *Beno v. Shalala*, *supra*, 30 F.3d at 1063 n.9.

B. Foundational Law and Precedents.

1. *Federal Recognition of Indian Tribes and the List.*

Recognition of an Indian Tribe is "a formal political act, it *permanently* establishes a government-to-government relationship between the United States and the recognized tribe as a 'domestic dependent nation,' and imposes on the government a fiduciary trust relationship to the tribe and its members." H.R. Rep. No. 103-781, at 2 (1994). ER120 (italics added). "Once recognized as a political body by the United States, a tribe retains its sovereignty until Congress acts to divest that sovereignty." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1]A] at p. 207 (Nell Jessup Newton ed., 2015) (hereinafter "COHEN'S HANDBOOK") (emphasis added); *see also Harjo v. Kleppe*, 420 F.Supp. 1110, 1142-1143 (D.D.C. 1976) *aff'd sub nom*. *Harjo v. Andrus,* 581 F.2d 949 (D.C. Cir. 1978) (congressional action to terminate a tribe must be explicit).

Federal recognition of Indian Tribes "traditionally came through official interaction between the federal government and the tribe, most often by way of treaty or statute." AMERICAN INDIAN LAW DESKBOOK, CONFERENCE OF WESTERN ATTORNEYS GENERAL § 2:6 at 102 (K. Armstrong et. al. 2016); *see also*, *The Kansas Indians*, 72 U.S. 737, 756 (1866) (actions of the United States in forming treaties with the head men of the Shawnees "settles, beyond controversy, that the Shawnees are as yet a distinct people, with a perfect tribal

organization.") In 1978, the BIA enacted regulations for unrecognized Tribes to petition for recognition. Those regulations are now found at Title 25 Part 83 of the Code of Federal Regulations. The BIA updated those regulations in 2015. ER639¶121 & ER674¶121.

Congress passed the FRTLA in 1994. Congress was motivated to enact the FRTLA because while the BIA "has a role in extending federal recognition to previously unrecognized tribes, [citation to Part 83] it does not have the authority to "derecognize' a tribe. However, the Department has shown a disturbing tendency in this direction." *See* ER121. The FRTLA provides in relevant part as follows:

> (6) the Secretary of the Interior is charged with *the responsibility of keeping a list of all federally recognized tribes*;
>
> (7) the list published by the Secretary *should be accurate, regularly updated, and regularly published*, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States; and
>
> (8) the list of federally recognized tribes which the Secretary publishes *should reflect all* of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

ER113 (emphasis added).

Accordingly, by its plain language the FRTLA does not confer upon Defendant the power to recognize and terminate tribes. It simply makes him responsible for keeping an accurate List. Indeed, the first List included hundreds of tribes. *See* ER340-342. Plaintiff is informed and believes that none of those tribes

ever petitioned the BIA for recognition pursuant to Part 83 or its predecessor regulations. They did not have to because those tribes were already federally recognized. It was simply Defendant's responsibility to List them.

2. *The BIA Has Established Precedent for the Addition of Tribes' Names to the List Outside of the Part 83 Process.*

a. The BIA Listed the Ione Band Outside of Part 83 In 1994.

On at least three well-documented instances since enactment of the FRTLA, the BIA has Listed a tribe that did not petition for recognition under Part 83. The first such correction was the addition of the Ione Band of Miwok Indians. (the "Ione"). The United States had never set aside any land for the Ione ER640¶130 & ER676¶130. It attempted to purchase land in the 1910s and 1920s and it denied a petition to purchase land on behalf of the Ione in 1941. *Id.*; *see also* ER421-422. In January 1972, with the assistance of the California Rural Indian Land Project ("CRILP"), the Ione contacted the BIA requesting that the BIA take a 40-acre parcel of land into trust for the Ione. ER426-427. Ten months later, the BIA learned that CRILP had assisted Ione to file suit to quiet title to that land. *Id.* The Commissioner of Indian Affairs wrote to the Ione, "Federal Recognition was evidently extended to the Ione Band of Indians at the time that the Ione Land purchase was contemplated" and he agreed to take the land into trust. ER427. The Ione prevailed in its quiet title action in October 1972. *See* ER429-430. Thereafter, the BIA *did not* take any land into trust and did not include the Ione on the first pre-

FRTLA List in 1979. ER641¶¶133 & ER677¶133; 44 Fed. Reg. 7,235 (Jan. 31, 1979).

In 1994, AS-IA Ada Deer "re-affirmed" the 1972 determination that the Ione became federally recognized when the United States "contemplated" purchasing land for the Ione in 1916. *See* ER432. Deer "implicitly" concluded that the federal relationship with the Ione persisted. *See* ER419-420. The BIA added the Ione to the List in 1995. *See* ER641¶¶134, 137 & ER677¶¶134, 137.

b. The BIA Listed Lower Lake Rancheria Outside of Part 83 in 2000.

In December 2000, AS-IA Kevin Gover added the Lower Lake Rancheria outside of the Part 83 procedure. ER641¶139 & ER678¶139. Gover relied on a memorandum drafted by BIA employee Dale Risling. *See* ER434-444 & ER446-469; *see also* ER423 (stating that Gover relied on Risling's memorandum).

The Lower Lake Rancheria was purchased in 1916 with funds appropriated by 38 Stat. 582 (1914) ER435. There were between 0 and 20 inhabitants of the Rancheria between 1916 and 1947. ER641¶140 & ER678¶140. "The Superintendent of the Sacramento Indian Agency considered the land uninhabitable, describing it as 'a rock pile without any water for domestic use'" ER435; *see also* ER449. In October 1947, the BIA granted an assignment of the entire Rancheria to four individual Indians (the Johnsons). ER642¶142 & ER678¶142. In 1956, the Lower Lake Act, 70 Stat. 595 (1956), transferred most of

the land to Lake County. ER642¶143 & ER678¶143. The Johnsons consented to the sale in return for the issuance of a fee patent to 41 acres of the land. ER642¶144 & ER678¶144. In two letters sent to the House Committee on Interior and Insular Affairs in 1954 and 1955, the BIA described the proposed sale as, "in line with" the plan and policy "of termination of Federal supervision over the property and activities of the Indians of the State of California." ER642¶145 & ER678¶145; *see also* ER436; ER453. Those letters were incorporated into the reports of the Committee regarding the Lower Lake Act. ER438, ER455. However, the Act "contains no words either expressly terminating, or expressing the intent to terminate, the legal status of either the Johnsons or the Tribe." ER642¶146 & ER679¶146; ER438. The BIA did not include Lower Lake on the first pre-FRTLA List in 1979, an error that carried over to all subsequent publications. ER642¶147 & ER679¶147. As of September 2000, the BIA considered Lower Lake terminated. *See* ER437 *see also* ER459 & 462.

In or about 1995, "Indian persons lineally descended from those having at one time a connection to the Lower Lake Rancheria…adopted a tribal constitution…, drafted enrollment and election ordinances, and an enrollment manual" and sought re-affirmation. ER437; ER465. AS-IA Gover concluded that statements in the Congressional record characterizing the Lower Lake Act as "in line with the plan and policy of termination" nevertheless "do not clearly evince an

express intent to terminate." ER438. Gover therefore concluded that "the federal relationship between the Lower Lake and the United States never ended." *See* ER417; ER473; ER481; ER492. Lower Lake is currently Listed as the "Koi Nation of Northern California." ER644¶158 & ER681¶158.

c. The BIA Successfully Relied on Its Ione and Lower Lower Lake Decisions In Federal Court in the *Muwekma* Cases in 2006-2013.

The Muwekma Ohlone tribe sought addition to the List after its Part 83 petition was denied. *See Muwekma Tribe v. Babbit*, 133 F.Supp.2d 30, 31-32 (D.D.C. 2000). In 2003, the Muwekma sued seeking placement on the List, and other injunctive relief. *See Muwekma #2, supra*, 452 F.Supp.2d at 112. It was undisputed that the Muwekma was previously recognized as the "Pleasanton or Verona Band," however, the Muwekma was not Listed. *See Muwekma, supra,* 133 F.Supp.2d at 31-32. The Muwekma moved for summary judgment arguing that the DOI violated the APA and equal protection by requiring Muwekma to petition under Part 83 when it had Listed Ione and Lower Lake outside of Part 83. *See id.* In other words, *Muwekma* made a similar argument to that Plaintiff now makes. *See* ER676-685¶¶128-190, ER689¶213.

On competing summary judgments, the Court concluded that the DOI was required to "cogently explain" why it required Muwekma to complete a Part 83 petition despite reaffirming Ione and Lower Lake outside of Part 83. *Id.* Because the court was unable to discern the DOI's rationale for disparately treating

Muwekma, it ordered the DOI to file an explanation not later than November 2006. *Id.* at p. 125.

The DOI timely filed its Explanation to Supplement the Administrative Record, (the "Muwekma Explanation.") *See* ER414-424. The DOI pointed out the Federal Government's purchase of land for the Lower Lake Rancheria in 1916, and that it held that land in trust until the Lower Lake Act authorized its sale. It also cited a report issued in 1927 that advised against purchasing land for Muwekma, and recommended purchasing land for Lower Lake. ER421. The DOI further observed that in 1935 it sought to acquire additional land for Lower Lake and other groups. *See id.*; citing ER449-450. The DOI also pointed out that a 1944 DOI report "noted the existence of a Lower Lake group living off the rancheria"; and that in 1947 it "authorized an individual to move onto the rancheria"; and that in 1950 it "surveyed the rancheria's population." ER421. The DOI noted that in 1953 the entry "*Lower Lake Reservation, Calif.*" was listed under the tribe "*POMO INDIANS*" in House Report 2503 *See* ER421; *see also* ER209-210. And it noted that in 1980 the BIA considered including the Lower Lake on the List, but did not do so. ER421; *see also* ER461. According to DOI, "[t]his evidence demonstrate[d] a pattern of Federal Dealings with Lower Lake…." supporting the conclusion that Lower Lake never lost its Federal recognition. ER420-421.

As to the Ione, DOI cited the government's attempts to purchase land for the

Ione, internal BIA communications "about the general 'Ione situation," and the BIA's 1972 denial of the petition from the Ione requesting the purchase of land. ER421-422. DOI observed that, by contrast, "[b]ecause there is no evidence of *any* Federal dealings with [Muwekma] after 1927, any relationship the group had with the Federal Government *had 'lapsed.*'") ER417 (emphasis added). In closing, DOI stated, "The treatment of Ione and Lower Lake were not based solely or even primarily on any claim of previous acknowledgment. Rather the decisions were based on continuous dealing and the existence of clearly defined communal land holdings." ER424.

The court declined to find that DOI's disparate treatment of Muwekma was arbitrary, capricious or unconstitutional. *See Muwekma Ohlone Tribe v. Salazar,* 813 F.Supp.2d 170, 198-199 (D.D.C. 2011) (hereinafter "*Muwekma #3*"). Muwekma appealed. *See Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209 (D.C. Cir 2013) (hereinafter "*Muwekma #4*"). The D.C. Circuit affirmed, holding that DOI's Muwekma Explanation "makes clear" that "the Lower Lake and Ione tribes, unlike Muwekma, had multiple post-1927 government-to-government interactions with the United States." 708 F.3d at 216-217.

d. The BIA Listed the Tejon Tribe Outside of Part 83 in 2012—Citing Both Its Ione and Lower Lake Decisions As Precedent.

In December 2011, AS-IA Echo Hawk corrected the List to add the Tejon Indian Tribe. ER644¶160 & ER681¶160. He wrote:

> It is clear that the United States previously and unambiguously recognized a political relationship with the Tejon Indian Tribe. Not only did the United States sign a treaty with the Tribe in 1851, it litigated on the Tribe's behalf—all the way to the United States Supreme Court—in an effort to obtain title to the land occupied by the Tribe. When that effort did not succeed, the United States made multiple efforts to purchase the same land for the Tribe. When the owners would not sell the land, the United States continued to monitor the welfare of the Tribe. The United States also withdrew lands from the public domain specifically to provide a land base for the Tejon Indian Tribe in 1916. Although the United States returned this land to the public domain in 1962, since the Tribe had made no use of it as the land was not fit for habitation, this act was not intended to terminate the Tribe. Congress has never formally terminated the Tribe's legal and political status.

ER478.

Echo Hawk observed that "[t]hese circumstances point to an oversight in the list of federally recognized tribes, rather than an actual change in the status of the Tejon Indian Tribe." *Id.* Relying on Secretary Gover's 2000 Lower Lake Decision, he wrote,

> The acknowledgment regulation [at 25 C.F.R. part 83] does not apply to Indian tribes whose government-to-government relationship was never severed. Rather, it applies to tribes who have yet to establish such a government-to-government relationship when a previously existing government-to-government relationship has lapsed or when the government-to-government relationship was terminated through an administrative process.

ER471, ER473. Echo Hawk then reiterated those principals when he responded to a House Committee on Natural Resources letter seeking clarification about his Tejon decision. *See* ER484. Congress has never passed any legislation in response. The Tejon Indian Tribe is currently on the List. ER645¶174 & ER683¶174.

3. *The Correction Precedents Provide Judicially-Reviewable Factors for Assessing the Lawfulness of Defendant's Decision.*

Based on the above-described precedents, three factors control the BIA's determinations that a tribe was erroneously un-Listed: (1) whether the tribe ever attained federal recognition; (2) whether the tribe's government-to-government relationship thereafter lapsed; and (3) whether the tribe's relationship was ever terminated. *See* ER471.

***As to the first factor*,** prior federal recognition is easily shown by demonstrating that the tribe in question engaged in treaty negotiations with the United States, *see Kansas Indians, supra*, 72 U.S. at 756—whether or not that treaty was ratified. *See* ER474n.3 (citing un-ratified 1851 treaty with Tejon). It is also shown if the United States withdrew land from the public domain for the tribe, *see id.* (third paragraph) or even "attempted" or "contemplated" doing so. *See id.*; *see also* ER432.

***As to the second factor*,** a tribe's government-to-government relationship has not *lapsed* if, after recognition, there is evidence of a history of the federal government's periodic awareness of the un-Listed tribe—even if that awareness is shown by the BIA's knowing failure to administer services to the tribe. *See* ER471-479; ER432; ER414-424; ER426-427 (describing knowing failure to purchase land and knowing refusal to administer services to Ione, Lower Lake, and Tejon); *see also* ER421 (relying on BIA's *refusal to List* Lower Lake in 1980 as a "federal

dealing" supporting the conclusion that Lower Lake never Lapsed.); *accord, Muwekma #4, supra*, 708 F.3d at 214, 216-217 (identifying that 1980 refusal among "clear" evidence of "interaction"); *compare* ER417 (distinguishing the Muwekma as "lapsed" because "there is no evidence of any Federal dealings with a [Muwekma] after 1927….").

The question of whether a tribe's federal relationship "lapsed" turns on the *federal government's* awareness during the tribe's period of absence from the List. The tribe's *own* engagement of the United States, or the state of the tribe's government, have not been relevant factors. *See, e.g.*, ER437; ER464-469 (descendants of those with an interest in Lower Lake Rancheria first organized and came forward in or about 1995—after approximately forty years of the BIA considering Lower Lake to be terminated.) *see also* ER474-479 (silent as to how or when the Tejon affirmatively engaged the United States for at least sixty years prior to re-affirmation).

***As to the third factor*,** the Court should simply determine whether there is any legislation that explicitly terminates the tribe. *See* ER438-439 (legislation characterized as "in line with" the present policy of termination did "not clearly evince an express intent to terminate."); *see also* ER478 ("Congress has never formally terminated the [Tejon] Tribe's legal and political status.")

Defendant's decision refusing to List the Cupeño provided no analysis on

any of these three factors. *See* ER488-490. It should be reversed as arbitrary and unreasoned on that basis alone. *See Cascadia Wildlands, supra,* 801 F.3d at 1110 (failure to consider an important aspect of the problem merits reversal under the APA.)

C. Defendant Is Required to List Any Un-Listed Tribe Whose Federal Relationship Has Not Lapsed or Been Terminated.

The District Court ruled that none of the Correction precedents summarized above bind Defendant and that no law requires Defendant to correct the List. ER19:16-ER20:2. Plaintiff respectfully disagrees. The United States trust duty to Indian tribes, the FRTLA, and the precedents summarized above all mandate that Defendant correct the List.

Perhaps the most fundamental principal of federal Indian law is that the federal government has a fiduciary trust relationship with Indian tribes. *See generally*, COHEN'S HANDBOOK, *supra*, § 5.04[3][a] at 412. The United States "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation v. U.S.*, 316 U.S. 286, 296-297 (1942).

Thus, actions that might otherwise be within Defendant's discretion may be found arbitrary and capricious in the context of his trust responsibility to Indians. *See, e.g.*, *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252 (D.D.C. 1972)

(Secretary's actions were breach of trust and thus arbitrary and capricious); *Jicarilla Apache Nation v. Supron Energy Corp.*, 782 F.2d 1555, 1566 (10th Cir. 1984) (it is significant error to "employ[] administrative law analysis without considering what role, if any, the Secretary's fiduciary duty should play in a court's examination of his administrative action.")

Because of the trust relationship, it has long been the rule that statutes passed for the benefit of Indians, treaties with tribes, and the federal government's other dealings with tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. *See Alaska Pac. Fisheries Co. v. U S*, 248 U.S. 78, 89 (1918); *see also, Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 728, 730 (9th Cir. 2003) (where "an examination of the legislative history and [statute's] stated purpose does not resolve the ambiguities in the operative text[,]" the court relies on Indian canons to credit the tribal party's construction, "not because it is necessarily the better reading, but because it favors Indian tribes and the statute…is both ambiguous and intended to benefit those tribes.").

The FRTLA is legislation passed for the benefit of Indians. *See* Pub. L. No. 103-454, 108 Stat. 4791 § 103(2), ER112 (expressing United States' trust duty to Indians in Congressional findings supporting the FRTLA); *see also* H.R. Rep. No. 103-781, at 3 (1994), ER121 (expressing congress's disapproval of the Secretary's

"disturbing tendency" to "derecognize" tribes). As a statute passed for the benefit of Indians, the FRTLA must be construed liberally in favor of the Cupeño. *See, e.g., Artichoke Joe's, supra,* 353 F.3d at 728.

By a plain reading, the FRTLA requires the Secretary of the Interior to publish a List that is "accurate" and "reflects all of the federally recognized Indian tribes in the United States that are eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Pub. L. No. 103-454, 108 Stat. 4791 § 103(7)-(8). That mandate of "accuracy" would be meaningless if the FRTLA is interpreted to grant Defendant *carte blanche* authority to refuse to correct the List. *See also id.* § 202(3)-(4) ER113 ("(3) the Secretary does not have the authority to terminate the federally recognized status of an Indian tribe as determined by Congress; (4) the Secretary may not administratively diminish the privileges and immunities of federally recognized Indian tribes without the consent of Congress;…."). Interpreting the FRTLA to permit Defendant to determine that the Cupeño must go through Part 83 (without his considering evidence of prior, un-lapsed federal recognition) would empower Defendant to de-recognize the Cupeño. *See* 25 C.F.R. § 83.3, *supra*. That is the very abuse that the FRTLA was enacted to prevent. *See* H.R. Rep. No. 103-781, at 3 (1994), ER121.

Significantly, the BIA's own well-documented practice *is consistent with*

Plaintiff's interpretation of the FRTLA. The three precedent tribes summarized above demonstrate that the BIA has always understood its duties under FRTLA to include not only the duty to List tribes that attain recognition through Part 83, but also the duty to correct the List (outside of Part 83) when an un-Listed tribe demonstrates that it has been recognized and that its federal relationship has not lapsed or been terminated. *See* ER471 (Part 83 did not apply to the Tejon); *see also* 25 C.F.R. § 83.3 ("This part applies only to indigenous entities that are not federally recognized Indian tribes."); *see also* ER484 ("a fact intensive analysis must be conducted to determine whether the United States had a previous, unambiguous political relationship with a particular tribe in question that has not been severed or lapsed.") Indeed, the very term "administrative error," (a term *the BIA itself coined* to explain its Ione, Lower Lake, and Tejon decisions (*see* ER417, ER420, ER422, ER471, ER473) clearly connotes the breach of some objective standard, and thus is consistent with Plaintiff's interpretation that the FRTLA obligates Defendant to correct the List.

D. The Political Question Doctrine Does Not Bar This Case.

The District Court concluded that tribal *recognition* is a matter solely for the political branches of government and may not be subjected to judicial review, and that, unless Plaintiff exhausts the part 83 procedure, this case presents a nonjudiciable political question. ER34:21-ER36:14. Plaintiff respectfully submits

that the District Court misapplied the Political Question doctrine.

1. *None of the Authorities the District Court Cited Support the Application of the Political Question Doctrine in This Case.*

The District Court principally relied on *Miami Nation of Indians v. U.S. Dep't. of Interior,* 255 F.3d 342 (7th Cir. 2001), and *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004). Neither *Miami* nor *Kahawaiolaa* are on point because neither case reviews the denial of a request to correct the List. To reiterate: *Plaintiff is not seeking federal recognition*, but rather, Plaintiff is seeking correction of the List by presenting facts to Defendant that show the Cupeño's federal relationship has never lapsed or been terminated *pursuant to the BIA's own well-documented and judicially-approved policy and precedents*.

Moreover, both *Miami* and *Kahawaiolaa* concluded that the Political Question doctrine *did not apply* to bar review of the BIA's federal recognition decisions. *See Miami, supra,* 255 F.3d at 348-349 ("The political-questions doctrine is … not in play and does not prevent the Miami Nation from arguing that the Department of the Interior committed error in the interpretation or application of the [federal recognition] regulation,….")

> That constitutional questions concerning the administration of the acknowledgment regulations are justiciable was made abundantly clear in *Greene v. Babbit*, 64 F.3d 1266 (9th Cir. 1995), in which we held that the Department of Interior's acknowledgment procedures were subject to the Due Process Clause.

Kahawaiolaa, supra, 386 F.3d at 1276.

Thus, to the extent this case bears a superficial similarity to *Miami* and *Kahawaiolaa*, both of those cases only provide authority that the Political Question Doctrine *does not apply*.

The District Court read a holding into *Miami* that the *Miami* court never expressed. According to the District Court, *Miami* held that "outside the Part 83 regulations, recognition of an Indian Tribe remains a political question…" ER29:22-24. Plaintiff respectfully disagrees. The *Miami* court *noted* that the *recognition* has "*traditionally*" been held to be a political question.

> But this conclusion assumes that the executive branch has not sought to canalize the discretion of its subordinate officials by means of regulations that require them to base recognition of Indian tribes on the kinds of determination, legal or factual, that courts routinely make. By promulgating such regulations the executive brings the tribal recognition process within the scope of the Administrative Procedure Act. [Citations.] And the Act has been interpreted (1) to require agencies, on pain of being found to have acted arbitrarily and capriciously, to comply with their own regulations (whether formal, as here, **or doctrines of a common law character**) until the regulations are altered by proper procedures, [citations], and (2) to make compliance with the regulations judicially reviewable, provided there is law to apply to determine compliance, [citations]—**as there is if despite the lack of *statutory* criteria, the agency's regulation establishes criteria that are "legal" in the sense not just of being obligatory but of being the kind of criteria that courts are capable of applying.** [Citations.]

Miami, supra, 255 F.3d at 348 (italics original, bold emphasis added). Thus, fundamentally, the *Miami* court held that where the BIA makes a decision by employing criteria that courts are capable of reviewing, the BIA has to act

consistently—even as to those matters that have "traditionally" been considered political questions. *See id.*

In this case, the BIA's prior decisions "set forth sufficiently 'law like' criteria to provide a reasoned judicial decision" as to whether a particular tribe's absence from the List is error. *See Section* V(B)(3), *supra.* Moreover, as those precedents illustrate, Defendant violated the Part 83 regulations themselves. Specifically, 25 C.F.R. § 83.3 required him to first determine whether Part 83 applies to the Cupeño. To do that, he had to consider Plaintiff's evidence that the Cupeño became federally recognized, and determine whether that federal recognition has lapsed or been terminated. *See* ER484. He did not. *See* ER488-490.

The District Court's other authorities are all inapposite. In *Robinson v. Salazar*, 885 F.Supp.2d 1002 (E.D. Cal. 2012) the Kawaiisu Tribe of the Tejon sent a letter to the Secretary of the Interior requesting that it be added to the List, and the Secretary failed to respond. *Id.* at 1026. However, unlike the Cupeño, the Kawaiisu did not first seek an order that the Secretary respond. Instead, it simply sought an order compelling the Secretary to add it to the List—abandoning any administrative process and proceeding to court without permitting the BIA to apply its expertise and issue a decision. *See id.* at 1027, 1031. The *Robinson* court thus held that the Kawaiisu had failed to exhaust the administrative process. *See id.* at 1035. The Kawaiisu did not even invoke the APA in its Complaint. *See id.* at 1028.

Nor did it allege that the Secretary acted arbitrarily or capriciously—it could make no such allegation because it did not wait for the Secretary to respond to its request as Plaintiff did in this case, so there was *no agency action* to review. *See id.* at 1031.

United Tribe of Shawnee Indians v. U.S., 253 F.3d 543 (10th Cir. 2011) *("UTSI")* is similarly inapposite. In that case, the UTSI had filed a Part 83 petition, but abandoned it prior to receiving a decision. *Id.* at 546. Unlike Plaintiff, the UTSI did not request Correction of the List. *See id.* Accordingly, there was *no decision* for the court to review. Indeed, the UTSI conceded as much--arguing that it was not proceeding under the APA, and that, therefore final agency action was not required. *See id.* at 549-550. The UTSI simply sought a bare judicial declaration that it is a tribe. *See id.* The court held that whether or not the UTSI was a tribe must be decided "in the first instance" by the Department of the Interior. *See id.* at 551. In sum, unlike Plaintiff, the UTSI did not give the Department of the Interior the opportunity to apply its expertise and make a decision that the Court could review.

James v. Dep't of Health & Human Servs., 824 F.3d 1132 (D.C. Cir. 1987) was decided in 1987, before the FRTLA was enacted, and before any of the precedent correction of error cases. So the law controlling this case did not even exist when *James* was decided. Thus in *James*, as in *UTSI*, the plaintiff sought a

bare declaration that it was a tribe, and an order compelling its placement on the pre-FRTLA List. *See James, supra*, 824 F.2d at 1135. The plaintiff in *James* never exhausted any administrative procedure. *See id.* at 1137. *James* has no application to this case.

Finally, the District Court's reliance on 25 C.F.R. § 83.12, which provides a streamlined petition process for "previously recognized tribes" is clearly misplaced. *See* ER25:9-ER26:6; ER26:22-ER27:13; ER33:15-24. The text of Part 83, and the three precedent tribes plainly show that section 83.12 (indeed the entirety of Part 83) only applies to tribes who, after being federally recognized, were later terminated, or their federal relationship later "lapsed." *See* 25 C.F.R. § 83.3; ER471; ER484-486.

Defendant himself actually never mentioned section 83.12 in his decision. And Defendant did not state that Plaintiff's request was not cognizable as presented. On the contrary, he considered the request and he denied it—in an opaque and unreasoned decision. *See* ER488-490. The District Court should never have even considered the purported application of section 83.12 as Defendant's grounds for denying Plaintiff's request. *See Chenery*, *supra*, 318 U.S. at 87; *Vitarelli*, *supra*, 359 U.S. at 546; *Philadelphia Gas Works, supra*, 989 F.2d at 1250; *Cascadia Wildlands, supra*, 801 F.3d at 1110. Plaintiff respectfully submits that the fact that the District Court felt the need to formulate its own reasons for

Defendant's decision shows beyond dispute that Defendant's decision fails to pass muster under the APA and must be reversed.

As shown above, in Section V(B)(3), the circumstances under which a tribe must be added to the List to correct administrative error are clearly discernable. The prior corrections (like this case) present factors that courts are entirely capable of reviewing and weighing. Accordingly, to the extent a request for correction of the List could ever be characterized as an unreviewable Political Question (and Plaintiff knows of no law supporting that conclusion) in any case, under the District Court's own precedents, Defendant's disregard of BIA precedent and his misapplication of the Part 83 regulations would bring Defendant's refusal to correct the List "within the scope of the Administrative Procedure Act." *See Miami, supra,* 255 F.3d at 348.

Based on all of the foregoing, the District Court should have engaged this case--just as the District and Appellate courts in the *Muwekma* engaged that case. *See Muwekma #2, supra,* 452 F.Supp.2d at 118-125; *Muwekma #3*, *supra*, 813 F.Supp.2d at 198-199; *see also Muwekma #4, supra,* 708 F.3d at 214-218. The courts of this Circuit are no less capable than the Courts of the D.C. circuit.

2. *Plaintiff Has Exhausted the Administrative Process for Requesting Correction of the List.*

According to the District Court "[t]here is no administrative process for, quote, correcting the list, so plaintiff could not have exhausted a nonexistent

administrative process." ER36:4-6; ER17:22-ER18:3.

The Administrative Record shows that Plaintiff submitted its request for correction in the same manner such requests have been presented in the past. AS-IA Echo Hawk's decision re-affirming the Tejon says,

> On June 30, 2006, the Tejon Indian Tribe (Tribe), through Chairwoman Kathryn Montes Morgan, submitted information demonstrating that it has been officially overlooked for many years by the Bureau of Indian Affairs (BIA) even though its government-to-government relationship with the United States was never terminated….
>
> The Tribe requested that I review this matter and take action to reaffirm the Tribe's Federal relationship. On December 30, 2011, I sent a letter to Chairwoman Morgan, on behalf of the Department of the Interior (Department) and the BIA, that corrects this oversight.
>
> It was not necessary for the Tejon Indian Tribe to go through the Federal acknowledgment process outlined in [25 C.F.R. Part 83] because its government-to-government relationship had neither lapsed nor been administratively terminated. [Part 83] does not apply to Indian tribes whose government-to-government relationship was never severed.

ER471.

Just like Ms. Morgan, Plaintiff presented facts to Defendant showing that the Cupeño Tribe has been recognized and its government-to-government relationship has never lapsed or been terminated. *See* ER639¶¶118-120 & ER674¶¶118-120; ER373-383. Defendant first dodged his responsibility by handing the Cupeño off to the Office of Federal Acknowledgment (OFA) without even providing OFA with a copy of the Cupeño's request. *See* ER637¶98, ER638¶102-103 & ER671¶¶102-103. OFA Director Fleming (*head of the very office charged with reviewing Part 83 petitions*) stated that he would advise that the Cupeño's request

for correction of the List did not fall within his office. *See* ER638¶105 & ER672¶105.

The BIA thereafter repeatedly assured that the request was being considered and a response was being prepared. *See* ER638¶¶106-108 & ER672¶¶106-108. After waiting six months, Plaintiff reiterated its request in a 20-page letter with 220 pages of documentary support. *See* ER639¶¶118-119 & ER674¶¶118-119; *see also* ER373-383. Ten days later, Defendant Washburn issued the 2015 Policy Guidance—which vaguely and unlawfully implies that Defendant may no longer correct the List outside of Part 83. *See* ER412 (dated June 26, 2015). Plaintiff continued to wait and corresponded with the BIA as to its request. *See* ER640¶¶124-127 & ER675-676¶¶ 124-127. When Defendant failed to respond, Plaintiff filed its Original Complaint in this action seeking to compel a reasoned response from Defendant under 5 U.S.C. §§ 551(13) and 706. *See* ER691. Finally, in February 2016, more than a year after Plaintiff made its request, Defendant responded denying the Request. *See* ER488-490 ("I decline to administratively re-affirm the federally recognized status of the Agua Caliente Tribe of Cupeño Indians of the Pala Reservation."); *see also* ER15:16-23 (Defendant's counsel stating on record , "the assistant secretary did consider whether it should make an exception in this case, and it decided it wasn't necessary because plaintiff was not situated similarly to those other three tribes….") Plaintiff made its request in the

proper manner, Defendant considered it, and he denied it in an unreasoned decision. That decision is now properly subject to judicial review.

E. Defendant's Refusal to Correct the List Is Arbitrary, Capricious, and Irrational.

1. *The July 2015 Policy Guidance Is Irrelevant.*

In his February 2016 decision, Defendant quoted the July 1, 2015 Policy Guidance, as follows:

> [T]he Department's intent to make determinations to ***acknowledge*** Federal Indian tribes within the contiguous 48 states only in accordance with the regulations established for that purpose at 25 CFR part 83. This notice directs any ***unrecognized*** group requesting that the Department ***acknowledge*** it as an Indian tribe, through reaffirmation or any other alternative basis, to petition under 25 CFR part 83 unless an alternate process is established by rulemaking following the effective date of this policy guidance….
>
> Having worked hard to make the Part 83 process more transparent, timely and efficient, while maintaining Part 83's fairness, rigor, and integrity, the Department has decided that, in light of these reforms to improve the Part 83 process, that process should be the only method utilized by the Department to ***acknowledge*** an Indian tribe in the contiguous 48 states…. The Department has determined that it will no longer accept requests for ***acknowledgment*** outside the Part 83 process. Rather, the Department intends to rely on the newly reformed Part 83 process as the sole administrative avenue for ***acknowledgment*** as a tribe.

ER489 (emphasis added).

Defendant did not provide any explanation as to how the Policy Guidance could be relevant to the Cupeño's request; he simply quoted it. *See id.* The Policy Guidance *is not relevant on its face.* It does not state that the BIA will cease

correcting the List to remedy its errors, but focuses entirely on the recent updates to Part 83 that purportedly make it more transparent, timely, and efficient. But none of the three precedent tribes described above was reaffirmed outside of Part 83 on the basis that Part 83 was flawed. On the contrary, *each was Listed outside of Part 83 because Part 83 did not apply to them*—because each tribe was already in a federal relationship. *See,* ER471; ER417 & 420; ER481; ER484.

A Federal Register entry from 2008 shows that the BIA publicly embraced the distinction between "acknowledgment" and "the correction of administrative errors" *after* it re-affirmed Lower Lake in 2000, *after* it successfully explained that reaffirmation in federal court in the *Muwekma* case in 2006, and *before* it reaffirmed the Tejon in 2012. That 2008 entry publishes the BIA's final rules implementing 25 U.S.C. § 2719 governing gaming on lands acquired after 1988. It provides an exception for "restoration of lands for an Indian tribe that is restored to Federal recognition" *See* 25 U.S.C. 2719(b)(1)(B)(iii). In addressing public comments suggesting that "reaffirmation" be included as a means of "acknowledgment" the BIA rejected that suggestion responding, "While past ***reaffirmations*** were administered under this section, they were done ***to correct particular errors***. Omitting any other avenues of ***administrative acknowledgment*** is consistent with the notes accompanying the [FRTLA] that reference only the part 83 regulatory process as the applicable administrative process." 73 Fed. Reg.

29,363 (May 20, 2008) (emphasis added). Thus, according to the BIA, "reaffirmation" is clearly distinct from "acknowledgment." And while *reaffirmation* may occur without a Part 83 petition, *acknowledgment* requires one. *See id.*; *compare* ER471-479.

In other words, the July 2015 Policy Guidance did not change BIA Policy as to correction of the List. Since Part 83 was implemented, the BIA *has always* maintained that Part 83 is the only administrative process for "acknowledgment" as a tribe. *See id.* However that *has never* stopped the BIA from "reaffirming" tribes by correcting administrative errors. *See, e.g.,* ER414; ER471; ER479; ER481. Such corrections have always been required because Defendant is required to keep an accurate and complete List under the FRTLA, and Part 83 applies only to unrecognized tribes.

Since Defendant only quoted the 2015 Policy Guidance, it is impossible to discern to what extent he actually relied on it—if at all. However, to the extent he impliedly based his decision on the Policy Guidance, he took a nonsensical and arbitrary position--namely, that under a Policy Change, the BIA will no longer correct its administrative errors, because Part 83 (which has never applied to such errors) has now been updated *and still does not apply*.

Defendant's attorneys sought to articulate the relevance of the 2015 Policy Guidance in Defendant's Answer. *See* ER637¶100-101 & ER671¶100-101

(distinguishing the Tejon from the Cupeño by averring that "pursuant to the BIA policy issued July 1, 2015, Part 83 is applicable to all groups seeking to be added to the [List]"). But, after Plaintiff made the above argument in its Brief Supporting Summary Judgment in the District Court, *see* Dkt. No. 27-1, pp. 21-22, Defendant's attorneys *then* argued that the July 2015 Policy Guidance did not change the law. *See* ER64:6-ER65:11 (the Policy Guidance, if "relevant at all," did not impose new legal consequences, but merely reaffirmed that Part 83 would be applied without exception to all groups seeking federal recognition, "whether they are seeking federal recognition *for the first time or after a period of lapse*.") (emphasis added.) And what about a Tribe whose government-to-government relationship *has not lapsed?* By implication, nothing has changed, such a tribe should be added to the List outside of Part 83.

In summary, Defendant failed to articulate his decision, and when his attorneys felt compelled to do so, they ended up contradicting themselves. *See* ER637¶¶100-101 (July 2015 Policy Guidance changed the law); *compare* ER64:6-ER65:11 (July 2015 Policy Guidance did not change the law). Plaintiff respectfully submits that when Defendant's attorneys cannot explain his decision without contradicting themselves, that decision plainly is not rational.

2. *The Record Does Not Support Defendant's Contention that the Cupeño Has Withdrawn from a Federally Recognized Tribe.*

Defendant's only other purported reason for refusing Plaintiff's request was

his contention that Plaintiff's members

> are, or were until recently, members of the Pala Band of Mission Indians, a federally recognized tribe. Thus the Agua Caliente Tribe of Cupeño Indians is not similarly situated to the reaffirmed tribes as none of those tribes claimed to be withdrawing or dissociating from a federally recognized tribe.

ER489*; see also* ER647¶197.

Defendant provided no analysis as to *why* the above-quoted distinction should be legally relevant. Simply identifying a difference does not suffice. Defendant was required to provide a reasoned basis for *why* the difference supports a different result—i.e., why the difference is "material." *See, e.g., Los Angeles v. Shalala, supra*, 192 F.3d at 1022. In extensive briefing and argument in the District Court, Defendant still has not explained any relevance of that purported distinction—nor did the District Court. ER20:9-ER24:10.

Moreover, the Administrative Record does not support Defendant's contention that the PBMI is a single federally-recognized tribe. Defendant cannot reasonably dispute that the Cupeño and Pala Luiseño formed separate federal relationships more than a century ago. The 1852 Temecula treaty and 1875 reservation grants were each alone sufficient to form those government-government relationships. Indeed, directly analogous facts also showed that the United States "previously and unambiguously recognized a political relationship with the Tejon Indian Tribe." ER478 (citing 1851 treaty with Tejon as clear evidence of federal

recognition); *see also* ER432 (concluding the Ione was federally recognized when the United States only "contemplated" purchasing land.)

Defendant admits that the Pala Luiseno are *Luiseño* Indians, while the PBMI is comprised of all of the Indians of the Pala Reservations, including the Pala Luiseno, and the Cupeño. *See* ER638¶111 & ER673¶111. Defendant admits that the PBMI was not formed until 1960. *See* ER631¶¶51-52 & ER662-663¶¶51-52. Defendant thus admits that the PBMI, the Pala Luiseño, and the Cupeño are three distinct entities. *Id., see also* ER638¶¶110-111 & ER673¶110-111 ("Defendant avers that the PBMI *includes* the Pala Luiseno.") (emphasis added). However, throughout this entire proceeding, Defendant has persistently used the term "Pala Band" without ever explaining *which* admittedly distinct "Pala Band" he is referring to. *See, e.g.*, ER50:15 (establishing "Pala Band" as short form for the "Pala Band of Mission Indians"); *see also id.* at ER51:3-4 (purporting to explain that a large group of Cupeño Indians were disenrolled from the "Pala Band"); *but see also* ER59:4-5 (arguing that the "Pala Band" attained federal recognition in 1891 under the Mission Indian Relief Act—*i.e. 69 years before the PBMI existed and a decade before the Cupeño was relocated to New Pala*); *see* ER629¶34 *compare* ER631¶¶51-52 *see also* ER60:22-23 (the "Pala Band's" longstanding federal relationship is shown by the extension of its land patents in 1936—*24 years before the PBMI existed*); *but see id.* at ER61:23-24 (arguing that after approving

the *PBMI* articles of association in 1961, the United States recognized the "Pala Band" as the only tribal entity at Pala).

In sum, for Defendant's attorneys, the "Pala Band" is simultaneously *either* the Pala Luiseño, *or* the PBMI, or *both*, depending on what feels most convenient to justify their position of the moment. Defendant's avoidance of any precision on such a fundamental point is another potent illustration that Defendant's decision is capricious and irrational. And the District Court embraced that unacceptable ambiguity in its own decision. *See* ER32:19-23 (holding that the "Pala Band" is a federally recognized tribe that "has long appeared on the list"); *compare* ER686¶192 & ER647¶192 (undisputed that PBMI first appeared on the List in 2016.)

Defendant cannot explain how the PBMI ever lawfully became a federally recognized tribe. The PBMI could not go through Part 83. *See* 25 C.F.R. § 83.4(a) (excluding associations formed in recent times); *see also* § 83.11(a) (mandating existence as a distinct community since 1900); *compare* ER631¶¶51-52 & ER662-663¶¶51-52 (admitting the PBMI was not formed until 1960.) When asked to explain how the PBMI became recognized, Defendant's attorney stated (and the District Court accepted) that the PBMI became federally recognized in 1961. *See* ER21:9-20. *Under what authority?* Under the BIA's purported "plenary authority dealing with Indian affairs." *See id.*; *see also* ER496-497 (BIA response to 2015

FOIA request stating it has no congressional acts, executive orders, or secretarial orders that establish PBMI as a tribe.)

Congress, not the BIA, has "plenary and exclusive" authority over Indian affairs. *See, United States v. Lara*, 541 U.S. 193, 200 (2004). Congress has never delegated the BIA any authority by which it could have ever recognized the PBMI in 1961—let alone thereby caused a termination of both the Cupeño and Pala Luiseño. *See id.* Indeed, Congress was motivated to enact the FRTLA finding that the BIA was unlawfully purporting to exercise such authority. *See* ER121.

Defendant cannot identify any legislation terminating the Cupeño or the Pala Luiseño. He cannot identify any facts showing the Cupeño or the Pala Luiseño consented to relinquish their sovereignty and form one tribe. It is undisputed that neither the Articles of Association nor the PBMI Constitution express such consent. *See* ER633¶¶65-66 & ER665¶¶65-66; ER636¶90 & ER669¶90. And no law authorizes Defendant, or authorized any of his predecessors, to consolidate the two tribes into a single tribe. Indeed, since 1882, by federal statute, such consolidation is only authorized as to tribes that each reside on an executive order reservation—*and only with their consent*. *See* 25 U.S.C. § 63. Old Pala was created by Executive order. *See* ER628¶23 & ER657¶23; ER241-242. But New Pala was created pursuant to Congressional mandate. *See* 32 Stat. 257 (1902). Accordingly, irrespective of consent, the two tribes could not have been consolidated under

section 63. Moreover, in 1927, Congress reserved for itself the power to change the boundaries of executive-order reservations. *See* 25 U.S.C. § 398d. Thus, Old Pala and New Pala cannot have been lawfully unified under any theory without Congressional action. And there has never been any such Congressional action.

Accordingly, even today, there are two distinct reservations at Pala *as a matter of law*. And those reservations are unequal in legal character. *See U.S. v. So. Pac. Trans. Co.,* 543 F.2d 676, 687 (9th Cir. 1976) (distinguishing feature of executive order reservations is that they may be terminated by Congress or the Executive without payment of compensation.) Thus, there are at least two groups of Indians at Pala to whom the United States owes distinct duties with respect to distinct and clearly-defined land holdings. In other words, there is not one federally recognized tribe at Pala.

3. *Defendant Violated BIA's Precedents by Refusing to List the Cupeño.*

Defendant's decision is also arbitrary, capricious, and irrational because he failed to provide a sufficiently reasoned justification for disparately treating the Cupeño. *See Ramaprakash, supra,* 346 F.3d at 1124; *Muwekma #2, supra,* 452 F.Supp.2d at 115.

a. The Cupeño Is Superiorly Situated to the Ione Band.

Defendant has never contested, that the United States provided the Cupeño with a reservation in 1875. *See* ER628¶21 & ER657¶21. Moreover, even after

canceling that reservation in 1880, ER494, the United States continued to administer services to the Cupeño. *See* ER499-501; ER161-168; ER174, ER177-178. No such evidence existed for the Ione. *See* ER421-422. The Administrative Record includes documents showing censuses that United States took of the Cupeño's members in 1893, 1897, 1902, 1905, 1910, and 2010 *see* ER499; ER158-159; ER144-145; ER503-504; ER258-261; ER367-368. The BIA cited a single 1915 census as evidence of the Ione's federal relationship. *See* ER421.

When the Cupeño Indians faced eviction, the Commissioner of Indian affairs reported to the U.S. Senate that they had "an exceedingly strong claim on the Government for protection in their right to their lands." ER177. The U.S. Attorney General then appealed to the United States Supreme Court on the Cupeño's behalf. *See* ER163. By contrast it was CRILP, *not the federal government*, that provided the Ione with legal assistance. *See* ER422. When the Supreme Court ruled against the Warner's Ranch Indians, the ARCIA characterized that situation as "the most noteworthy and unfortunate event that has…perhaps ever occurred in this agency…." *See* ER127-128. The urgency of that report, and the federal government's immediate action starkly contrast with the vague record of a 1933 report to the Commissioner of Indian Affairs about the general "Ione situation"—a situation that persisted without BIA action for another 60 years. *See* ER421. The BIA, the *Muwekma #3* court, and the *Muwekma #4* court all cited the foregoing

facts as clear evidence that Ione's government-to-government relationship never lapsed. *See* ER421-422; 813 F.Supp.2d 199; 708 F.3d 214, 217. The above-described facts should all place the Cupeño in a superior position to the Ione.

b. The Cupeño Is Superiorly Situated to Lower Lake.

Just like Lower Lake, there is no federal legislation terminating the Cupeño. *See* ER643-644¶156 & ER680¶156. But, *unlike* Lower Lake, Congress has not passed any legislation to take away the Cupeño's land, or any other legislation as to the Cupeño that could conceivably be interpreted as "in line with" a plan or policy of termination. *See* ER643¶153 & ER680¶153; *compare* ER436 & 438.

In the Muwekma Explanation, the BIA stressed that the Federal Government purchased land to establish the Lower Lake Rancheria in 1916. ER421; *see also* ER435 (citing 38 Stat. 582 (1914). Analogous facts are true of the Cupeño. *See* 32 Stat. 257 (1902). However, instead of purchasing an uninhabitable "rock pile"—as it did for Lower Lake, the federal government conducted an exhaustive search and found land for the Cupeño that it described in superlative terms. *See* ER146; ER288 (describing New Pala as "undoubtedly the best" reservation in Southern California.) The BIA also stressed in 2006 that the *existence* of Lower Lake had been recognized by the federal government when the entry "*Lower Lake Reservation, Calif.*" was listed under the tribe heading "*POMO INDIANS*" in House Report 2503. *See* ER421; *see also* ER209-210. That is the exact same report

that lists the "*CUPEÑO INDIANS*" ***as a tribe***. *See* ER202. As with Lower Lake, descendants of the original residents of the Agua Caliente and New Pala have adopted a Constitution and requested correction of the List. *See* ER394-395; ER519-555; *compare* ER437; ER465. The BIA relied on the foregoing facts to support its reaffirmation of Lower Lake outside of the Part 83 process. *See* ER421. The foregoing facts even more strongly support reaffirming the Cupeño.

c. The Cupeño Is Superiorly Situated to the Tejon.

In 1851, the Tejon signed a never-ratified treaty with the United States—just like the Cupeño did a year later. *See* ER474 n.3; *compare* ER180-183. Like the Tejon, the Cupeño was granted a reservation by executive order in the late 19th century. *See* ER628¶22 & ER657¶22, *compare* ER644¶162 & ER681¶162; ER241-242. Then, each tribe lost its land by order of the United States Supreme Court. *See Barker v. Harvey*, *supra,* 181 U.S. at 499; *compare* ER476, fn. 21 (*citing U.S. v. Title Ins. & Trust Co.*, 265 U.S. 472 (1924). Moreover, the United States unsuccessfully litigated on behalf of both the Tejon and the Cupeño in the United States Supreme Court. *See* ER163 *compare* ER478.

In contrast to the Tejon, after the Cupeño was evicted, the United States promptly purchased habitable lands to relocate the Cupeño. ER645¶177 & ER683¶177; ER644¶166 & ER682¶169; *compare* ER478 (Tejon reservation "not fit for habitation.") Indeed, as late as 1968, the United States was still securing

lands in trust for the Cupeño's benefit. *See* ER151-156. And, *unlike* the Tejon, the Cupeño actually *occupied* the land that the United States secured for it. ER629-630¶¶34, 38 & ER660-661¶¶34, 38; *compare* ER644¶167 & ER682¶167.

The BIA determined that the Tejon has an unlapsed government-to-government relationship citing the federal government's decades-long discussions, periodic monitoring, persistent failure, and finally complete abdication of efforts to secure habitable land for the Tejon from 1911 to 1962. *See* ER474-479. By contrast, the Cupeño has enjoyed the benefits of its trust lands continuously for over a century while the federal government has repeatedly exhibited its awareness of the Cupeño. *See* ER645¶177 & ER683¶177; *see also* ER264 (dealing with the Cupeño through its elected, and federally commissioned Captain at New Pala in 1903); ER268 (issuing tools to the "Agua Caliente Tribe" at New Pala in 1903); ER259-260 (identifying individuals as Cupeño Indians in 1910 Pala census); ER579-587 (recording allottees as belonging to the "Cupa" tribe in 1910-1913); ER202 (identifying the "*CUPEÑO INDIANS"* as a tribe in House Report 2503 in 1953); ER149 (recording allotments to members of the "Cupa" tribe as late as 1961); ER155 (recommending land be taken into trust for "Warner's Ranch Indians" and other groups at Pala in 1968); ER324-338 (tracking services administered to the "Cupeno" apart from the "Luiseno" and noting two reservations "Warner's Ranch (Pala)" and "Pala" in 1969); ER364 (publishing notice to alert

"the Cupeño (Cupa Kuupangaxwichem) Nation of the Pala Reservation, California" of items found at an archeological site in 2008); ER367-368 (tracking the Cupeño population as distinct from the Luiseño in the 2010 census.)

The Administrative Record shows that Cupeño and the Pala Luiseño, associated to form an association that they denominated a "*band*" (the PBMI) in or about 1959—and even that association was formed under the coaxing and misleading hand of the BIA. *See* ER227; ER309 (advising Indians, in violation of 25 U.S.C. § 63 and 25 U.S.C. § 398d that there is only one Pala Reservation). As a matter of law, that association or *band* is an inferior and less permanent organization than the historic tribes that associated to form it. *See* ER298; *see also Conners, supra* 180 U.S. at 275.

If the Cupeño's participation in the PBMI is legally relevant at all, it should operate to Plaintiff's favor. For the Cupeño's maintenance of its federal relationship through the PBMI (which is an association of tribes and Indians with distinct lands and rights as a matter of law) is simply more evidence of the Cupeño's un-lapsed status than any of the Precedent Tribes could show. For, unlike those tribes, there has never been a decades-long gap with no federal dealings. *See, e.g.,* ER435-437; ER464-469 (showing BIA considered Lower Lake to be terminated for almost 40 years prior to reaffirmation). Whether on its own, or through the PBMI, the Cupeño has enjoyed the benefits and services of its Relationship uninterrupted for more

than 150 years—*just like the Pala Luiseño has*. Plaintiff respectfully submits that the Administrative Record compels the conclusion that the Cupeño is similarly situated to the three precedent tribes in all *legally-relevant* respects.

VI. CONCLUSION

For all of the foregoing reasons, Plaintiff and Appellant, respectfully requests that the Court reverse District Court's decision and remand this case with instructions to grant Plaintiff's Motion for Summary Judgment.

DATED: January 17, 2018

Respectfully submitted.

THE LAW OFFICE OF
ANDREW W. TWIETMEYER

*/s/ Andrew W. Twietmeyer*_____
Andrew W. Twietmeyer
Attorney for Plaintiff-Appellant
The Agua Caliente Tribe of Cupeño Indians of the Pala Reservation

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Ninth Circuit Local 32-1 because this brief contains exactly 14,000 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word version 14.7.7.

DATED: January 17, 2018

Respectfully submitted,

THE LAW OFFICE OF
ANDREW W. TWIETMEYER

/s/ Andrew W. Twietmeyer_____
Andrew W. Twietmeyer
Attorney for Plaintiff-Appellant
The Agua Caliente Tribe of Cupeño Indians of the Pala Reservation

STATEMENT OF NO RELATED CASES

Counsel is aware of no cases pending before the Ninth Circuit that would be deemed related pursuant to Ninth Circuit Rule 28-2.6.

DATED: January 17, 2018

Respectfully submitted,

THE LAW OFFICE OF
ANDREW W. TWIETMEYER

/s/ Andrew W. Twietmeyer_____
Andrew W. Twietmeyer
Attorney for Plaintiff-Appellant
The Agua Caliente Tribe of Cupeño Indians of the Pala Reservation

C.R. 28-2.7 ADDENDUM

CIRCUIT RULE 28-2.7 ADDENDUM

Table of Contents

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part I. The Agencies Generally
Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 706

§ 706. Scope of review

Currentness

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

Notes of Decisions (3889)

5 U.S.C.A. § 706, 5 USCA § 706
Current through P.L. 115-90. Also includes P.L. 115-92, 115-94, and 115-95. Title 26 current through 115-96.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 2. Officers of Indian Affairs

25 U.S.C.A. § 63

§ 63. Consolidation of agencies

Currentness

The President may, in his discretion, consolidate two or more agencies into one, and where Indians are located on reservations created by Executive order he may, with the consent of the tribes to be affected thereby, expressed in the usual manner, consolidate one or more tribes, and abolish such agencies as are thereby rendered unnecessary.

CREDIT(S)

(May 17, 1882, c. 163, § 6, 22 Stat. 88; July 4, 1884, c. 180, § 6, 23 Stat. 97.)

25 U.S.C.A. § 63, 25 USCA § 63
Current through P.L. 115-90. Also includes P.L. 115-92, 115-94, and 115-95. Title 26 current through 115-96.

End of Document

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45. Protection of Indians and Conservation of Resources (Refs & Annos)

25 U.S.C.A. § 5125
Formerly cited as 25 USCA § 478

§ 5125. Acceptance optional

Currentness

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

CREDIT(S)

(June 18, 1934, c. 576, § 18, 48 Stat. 988.)

Notes of Decisions (5)

25 U.S.C.A. § 5125, 25 USCA § 5125
Current through P.L. 115-90. Also includes P.L. 115-92, 115-94, and 115-95. Title 26 current through 115-96.

End of Document

PL 103–454, November 2, 1994, 108 Stat 4791

UNITED STATES PUBLIC LAWS
103rd Congress - Second Session
Convening January 25, 1994

Additions and Deletions are not identified in this document.
8848

PL 103–454 (HR 4180)
November 2, 1994
FEDERALLY RECOGNIZED INDIAN TRIBE LIST ACT OF 1994

An Act to provide for the annual publication of a list of federally recognized Indian tribes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—WITHDRAWAL OF ACKNOWLEDGEMENT OR RECOGNITION

<< 25 USCA § 479a NOTE >>

SEC. 101. SHORT TITLE.

This title may be cited as the "Federally Recognized Indian Tribe List Act of 1994".

<< 25 USCA § 479a >>

SEC. 102. DEFINITIONS.

For the purposes of this title:
(1) The term "Secretary" means the Secretary of the Interior.
(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.
(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 104 of this title.

<< 25 USCA § 479a NOTE >>

SEC. 103. FINDINGS.

The Congress finds that—
(1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;
(2) ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;
(3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court;
(4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;
(5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore

recognition to tribes that previously have been terminated;
(6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;
(7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States; and
(8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

<< 25 USCA § 479a–1 >>

SEC. 104. PUBLICATION OF LIST OF RECOGNIZED TRIBES.

(a) PUBLICATION OF THE LIST.—The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
(b) FREQUENCY OF PUBLICATION.—The list shall be published within 60 days of enactment of this Act, and annually on or before every January 30 thereafter.

TITLE II—CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA

<< 25 USCA § 1212 NOTE >>

SEC. 201. SHORT TITLE.

This title may be cited as the “Tlingit and Haida Status Clarification Act”.

<< 25 USCA § 1212 >>

SEC. 202. FINDINGS.

The Congress finds and declares that—
(1) the United States has acknowledged the Central Council of Tlingit and Haida Indian Tribes of Alaska pursuant to the Act of June 19, 1935 (49 Stat. 388, as amended, commonly referred to as the “Jurisdiction Act”), as a federally recognized Indian tribe;
(2) on October 21, 1993, the Secretary of the Interior published a list of federally recognized Indian tribes pursuant to part 83 of title 25 of the Code of Federal Regulations which omitted the Central Council of Tlingit and Haida Indian Tribes of Alaska;
(3) the Secretary does not have the authority to terminate the federally recognized status of an Indian tribe as determined by Congress;
(4) the Secretary may not administratively diminish the privileges and immunities of federally recognized Indian tribes without the consent of Congress; and
(5) the Central Council of Tlingit and Haida Indian Tribes of Alaska continues to be a federally recognized Indian tribe.

<< 25 USCA § 1213 >>

SEC. 203. REAFFIRMATION OF TRIBAL STATUS.

The Congress reaffirms and acknowledges that the Central Council of Tlingit and Haida Indian Tribes of Alaska is a federally recognized Indian tribe.

<< 25 USCA § 1214 >>

SEC. 204. DISCLAIMER.

(a) IN GENERAL.—Nothing in this title shall be interpreted to diminish or interfere with the government-to-government relationship between the United States and other federally recognized Alaska Native tribes, nor to vest any power, authority, or jurisdiction in the Central Council of Tlingit and Haida Indian Tribes of Alaska over other federally recognized Alaska Native tribes.
(b) CONSTITUTION OF CENTRAL COUNCIL OF THE TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA.—Nothing in this title shall be construed as codifying the Constitution of the Central Council of the Tlingit and Haida Indian Tribes of Alaska into Federal law.

<< 25 USCA § 1215 >>

SEC. 205. PROHIBITION AGAINST DUPLICATIVE SERVICES.

Other federally recognized tribes in Southeast Alaska shall have precedence over the Central Council of Tlingit and Haida Indian Tribes of Alaska in the award of a Federal compact, contract or grant to the extent that their service population overlaps with that of the Central Council of Tlingit and Haida Indian tribes of Alaska. In no event shall dually enrolled members result in duplication of Federal service funding.

TITLE III—PASKENTA BAND OF NOMLAKI INDIANS OF CALIFORNIA

<< 25 USCA § 1300m NOTE >>

SEC. 301. SHORT TITLE.

This title may be cited as the “Paskenta Band Restoration Act”.

<< 25 USCA § 1300m >>

SEC. 302. DEFINITIONS.

For purposes of this title:
(1) The term “Tribe” means the Paskenta Band of Nomlaki Indians of the Paskenta Rancheria of California.
(2) The term “Secretary” means the Secretary of the Interior.
(3) The term “Interim Council” means the governing body of the Tribe specified in section 307.
(4) The term “member” means an individual who meets the membership criteria under section 306(b).
(5) The term “State” means the State of California.
(6) The term “reservation” means those lands acquired and held in trust by the Secretary for the benefit of the Tribe pursuant to section 305.
(7) The term “service area” means the counties of Tehama and Glenn, in the State of California.

<< 25 USCA § 1300m–1 >>

SEC. 303. RESTORATION OF FEDERAL RECOGNITION, RIGHTS, AND PRIVILEGES.

(a) FEDERAL RECOGNITION.—Federal recognition is hereby extended to the Tribe. Except as otherwise provided in this title, all laws and regulations of general application to Indians and nations, tribes, or bands of Indians that are not inconsistent with any specific provision of this title shall be applicable to the Tribe and its members.
(b) RESTORATION OF RIGHTS AND PRIVILEGES.—Except as provided in subsection (d), all rights and privileges of the Tribe and its members under any Federal treaty, Executive order, agreement, or statute, or under any other authority which were diminished or lost under the Act of August 18, 1958 (Public Law 85–671; 72 Stat. 619), are hereby restored and the provisions of such Act shall be inapplicable to the Tribe and its members after the date of enactment of this Act.
(c) FEDERAL SERVICES AND BENEFITS.—Without regard to the existence of a reservation, the Tribe and its members shall be eligible, on and after the date of enactment of this Act, for all Federal services and benefits furnished to federally

recognized Indian tribes or their members. In the case of Federal services available to members of federally recognized Indian tribes residing on a reservation, members of the Tribe residing in the Tribe's service area shall be deemed to be residing on a reservation.
(d) HUNTING, FISHING, TRAPPING, AND WATER RIGHTS.—Nothing in this title shall expand, reduce, or affect in any manner any hunting, fishing, trapping, gathering, or water right of the Tribe and its members.
(e) INDIAN REORGANIZATION ACT APPLICABILITY.—The Act of June 18, 1934 (25 U.S.C. 461 et seq.), shall be applicable to the Tribe and its members.
(f) CERTAIN RIGHTS NOT ALTERED.—Except as specifically provided in this title, nothing in this title shall alter any property right or obligation, any contractual right or obligation, or any obligation for taxes levied.

<< 25 USCA § 1300m–2 >>

SEC. 304. ECONOMIC DEVELOPMENT.

(a) PLAN FOR ECONOMIC DEVELOPMENT.—The Secretary shall—
(1) enter into negotiations with the governing body of the Tribe with respect to establishing a plan for economic development for the Tribe;
(2) in accordance with this section and not later than two years after the adoption of a tribal constitution as provided in section 308, develop such a plan; and
(3) upon the approval of such plan by the governing body of the Tribe, submit such plan to the Congress.
(b) RESTRICTIONS.—Any proposed transfer of real property contained in the plan developed by the Secretary under subsection (a) shall be consistent with the requirements of section 305.

<< 25 USCA § 1300m–3 >>

SEC. 305. TRANSFER OF LAND TO BE HELD IN TRUST.

(a) LANDS TO BE TAKEN IN TRUST.—The Secretary shall accept any real property located in Tehama County, California, for the benefit of the Tribe if conveyed or otherwise transferred to the Secretary if, at the time of such conveyance or transfer, there are no adverse legal claims to such property, including outstanding liens, mortgages, or taxes owed. The Secretary may accept any additional acreage in the Tribe's service area pursuant to the authority of the Secretary under the Act of June 18, 1934 (25 U.S.C. 461 et seq.).
(b) LANDS TO BE PART OF THE RESERVATION.—Subject to the conditions imposed by this section, any real property conveyed or transferred under this section shall be taken in the name of the United States in trust for the Tribe and shall be part of the Tribe's reservation.

<< 25 USCA § 1300m–4 >>

SEC. 306. MEMBERSHIP ROLLS.

(a) COMPILATION OF TRIBAL MEMBERSHIP ROLL.—Within one year after the date of the enactment of this Act, the Secretary shall, after consultation with the Tribe, compile a membership roll of the Tribe.
(b) CRITERIA FOR MEMBERSHIP.—(1) Until a tribal constitution is adopted pursuant to section 308, an individual shall be placed on the membership roll if such individual is living, is not an enrolled member of another federally recognized Indian tribe, is of Nomlaki Indian ancestry, and if—
(A) such individual's name was listed on the Paskenta Indian Rancheria distribution roll compiled on February 26, 1959, by the Bureau of Indian Affairs and approved by the Secretary of the Interior on July 7, 1959, pursuant to Public Law 85–671;
(B) such individual was not listed on the Paskenta Indian Rancheria distribution list, but met the requirements that had to be met to be listed on the Paskenta Indian Rancheria list;
(C) such individual is identified as an Indian from Paskenta in any of the official or unofficial rolls of Indians prepared by the Bureau of Indian Affairs; or
(D) such individual is a lineal descendant of an individual, living or dead, identified in subparagraph (A), (B), or (C).
(2) After adoption of a tribal constitution pursuant to section 308, such tribal constitution shall govern membership in the

Tribe.
(c) CONCLUSIVE PROOF OF PASKENTA INDIAN ANCESTRY.—For the purpose of subsection (b), the Secretary shall accept any available evidence establishing Paskenta Indian ancestry. The Secretary shall accept as conclusive evidence of Paskenta Indian ancestry, information contained in the census of the Indians in and near Paskenta, prepared by Special Indian Agent John J. Terrell, in any other roll or census of Paskenta Indians prepared by the Bureau of Indian Affairs, and in the Paskenta Indian Rancheria distribution list, compiled by the Bureau of Indian Affairs on February 26, 1959.

<< 25 USCA § 1300m–5 >>

SEC. 307. INTERIM GOVERNMENT.

Until a new tribal constitution and bylaws are adopted and become effective under section 308, the Tribe's governing body shall be an Interim Council. The initial membership of the Interim Council shall consist of the members of the Tribal Council of the Tribe on the date of the enactment of this Act, and the Interim Council shall continue to operate in the manner prescribed for the Tribal Council under the tribal constitution adopted December 18, 1993. Any new members filling vacancies on the Interim Council shall meet the membership criteria set forth in section 306(b) and be elected in the same manner as are Tribal Council members under the tribal constitution adopted December 18, 1993.

<< 25 USCA § 1300m–6 >>

SEC. 308. TRIBAL CONSTITUTION.

(a) ELECTION; TIME AND PROCEDURE.—Upon the completion of the tribal membership roll under section 306(a) and upon the written request of the Interim Council, the Secretary shall conduct, by secret ballot, an election for the purpose of adopting a constitution and bylaws for the Tribe. The election shall be held according to section 16 of the Act of June 18, 1934 (25 U.S.C. 476), except that absentee balloting shall be permitted regardless of voter residence.
(b) ELECTION OF TRIBAL OFFICIALS; PROCEDURES.—Not later than 120 days after the Tribe adopts a constitution and bylaws under subsection (a), the Secretary shall conduct an election by secret ballot for the purpose of electing tribal officials as provided in such tribal constitution. Such election shall be conducted according to the procedures specified in subsection (a) except to the extent that such procedures conflict with the tribal constitution.

<< 25 USCA § 1300m–7 >>

SEC. 309. GENERAL PROVISION.

The Secretary may promulgate such regulations as may be necessary to carry out the provisions of this title.

Approved November 2, 1994.

PL 103–454, 1994 HR 4180

25 C.F.R. § 83.3

§ 83.3 Who does this part apply to?

Effective: July 31, 2015

Currentness

This part applies only to indigenous entities that are not federally recognized Indian tribes.

SOURCE: 80 FR 37888, July 1, 2015, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 479a–1; Pub.L. 103–454 Sec. 103 (Nov. 2, 1994); and 43 U.S.C. 1457.

Notes of Decisions (136)

Current through Jan. 11, 2018; 83 FR 1310.

End of Document

25 C.F.R. § 83.4

§ 83.4 Who cannot be acknowledged under this part?

Effective: July 31, 2015

Currentness

The Department will not acknowledge:

(a) An association, organization, corporation, or entity of any character formed in recent times unless the entity has only changed form by recently incorporating or otherwise formalizing its existing politically autonomous community;

(b) A splinter group, political faction, community, or entity of any character that separates from the main body of a currently federally recognized Indian tribe, petitioner, or previous petitioner unless the entity can clearly demonstrate it has functioned from 1900 until the present as a politically autonomous community and meets § 83.11(f), even though some have regarded them as part of or associated in some manner with a federally recognized Indian tribe;

(c) An entity that is, or an entity whose members are, subject to congressional legislation terminating or forbidding the government-to-government relationship; or

(d) An entity that previously petitioned and was denied Federal acknowledgment under these regulations or under previous regulations in part 83 of this title (including reconstituted, splinter, spin-off, or component groups who were once part of previously denied petitioners).

SOURCE: 80 FR 37888, July 1, 2015, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 479a–1; Pub.L. 103–454 Sec. 103 (Nov. 2, 1994); and 43 U.S.C. 1457.

Current through Jan. 11, 2018; 83 FR 1310.

End of Document

Code of Federal Regulations
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter F. Tribal Government
Part 83. Procedures for Federal Acknowledgment of Indian Tribes (Refs & Annos)
Subpart B. Criteria for Federal Acknowledgment

25 C.F.R. § 83.11

§ 83.11 What are the criteria for acknowledgment as a federally recognized Indian tribe?

Effective: July 31, 2015

Currentness

The criteria for acknowledgment as a federally recognized Indian tribe are delineated in paragraphs (a) through (g) of this section.

(a) Indian entity identification. The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group's character as an Indian entity has from time to time been denied will not be considered to be conclusive evidence that this criterion has not been met. Evidence to be relied upon in determining a group's Indian identity may include one or a combination of the following, as well as other evidence of identification.

(1) Identification as an Indian entity by Federal authorities.

(2) Relationships with State governments based on identification of the group as Indian.

(3) Dealings with a county, parish, or other local government in a relationship based on the group's Indian identity.

(4) Identification as an Indian entity by anthropologists, historians, and/or other scholars.

(5) Identification as an Indian entity in newspapers and books.

(6) Identification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations.

(7) Identification as an Indian entity by the petitioner itself.

(b) Community. The petitioner comprises a distinct community and demonstrates that it existed as a community from 1900 until the present. Distinct community means an entity with consistent interactions and significant social relationships within its membership and whose members are differentiated from and distinct from nonmembers. Distinct community must be understood flexibly in the context of the history, geography, culture, and social organization of the entity. The petitioner may demonstrate that it meets this criterion by providing evidence for known adult members or by providing evidence of relationships of a reliable, statistically significant sample of known adult members.

(1) The petitioner may demonstrate that it meets this criterion at a given point in time by some combination of two or more of the following forms of evidence or by other evidence to show that a significant and meaningful portion of the petitioner's members constituted a distinct community at a given point in time:

(i) Rates or patterns of known marriages within the entity, or, as may be culturally required, known patterned out-marriages;

(ii) Social relationships connecting individual members;

(iii) Rates or patterns of informal social interaction that exist broadly among the members of the entity;

(iv) Shared or cooperative labor or other economic activity among members;

(v) Strong patterns of discrimination or other social distinctions by non-members;

(vi) Shared sacred or secular ritual activity;

(vii) Cultural patterns shared among a portion of the entity that are different from those of the non–Indian populations with whom it interacts. These patterns must function as more than a symbolic identification of the group as Indian. They may include, but are not limited to, language, kinship organization or system, religious beliefs or practices, and ceremonies;

(viii) The persistence of a collective identity continuously over a period of more than 50 years, notwithstanding any absence of or changes in name;

(ix) Land set aside by a State for the petitioner, or collective ancestors of the petitioner, that was actively used by the community for that time period;

(x) Children of members from a geographic area were placed in Indian boarding schools or other Indian educational institutions, to the extent that supporting evidence documents the community claimed; or

(xi) A demonstration of political influence under the criterion in § 83.11(c)(1) will be evidence for demonstrating distinct community for that same time period.

(2) The petitioner will be considered to have provided more than sufficient evidence to demonstrate distinct community and political authority under § 83.11(c) at a given point in time if the evidence demonstrates any one of the following:

(i) More than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the entity, and the balance of the entity maintains consistent interaction with some members residing in that area;

(ii) At least 50 percent of the members of the entity were married to other members of the entity;

(iii) At least 50 percent of the entity members maintain distinct cultural patterns such as, but not limited to, language, kinship system, religious beliefs and practices, or ceremonies;

(iv) There are distinct community social institutions encompassing at least 50 percent of the members, such as kinship organizations, formal or informal economic cooperation, or religious organizations; or

(v) The petitioner has met the criterion in § 83.11(c) using evidence described in § 83.11(c)(2).

(c) Political influence or authority. The petitioner has maintained political influence or authority over its members as an autonomous entity from 1900 until the present. Political influence or authority means the entity uses a council, leadership, internal process, or other mechanism as a means of influencing or controlling the behavior of its members in significant respects, making decisions for the entity which substantially affect its members, and/or representing the entity in dealing with outsiders in matters of consequence. This process is to be understood flexibly in the context of the history, culture, and social organization of the entity.

(1) The petitioner may demonstrate that it meets this criterion by some combination of two or more of the following forms of evidence or by other evidence that the petitioner had political influence or authority over its members as an autonomous entity:

(i) The entity is able to mobilize significant numbers of members and significant resources from its members for entity purposes.

(ii) Many of the membership consider issues acted upon or actions taken by entity leaders or governing bodies to be of importance.

(iii) There is widespread knowledge, communication, or involvement in political processes by many of the entity's members.

(iv) The entity meets the criterion in § 83.11(b) at greater than or equal to the percentages set forth under § 83.11(b)(2).

(v) There are internal conflicts that show controversy over valued entity goals, properties, policies, processes, or decisions.

(vi) The government of a federally recognized Indian tribe has a significant relationship with the leaders or the governing body of the petitioner.

(vii) Land set aside by a State for petitioner, or collective ancestors of the petitioner, that is actively used for that time period.

(viii) There is a continuous line of entity leaders and a means of selection or acquiescence by a significant number of the entity's members.

(2) The petitioner will be considered to have provided sufficient evidence of political influence or authority at a given point in time if the evidence demonstrates any one of the following:

(i) Entity leaders or other internal mechanisms exist or existed that:

(A) Allocate entity resources such as land, residence rights, and the like on a consistent basis;

(B) Settle disputes between members or subgroups by mediation or other means on a regular basis;

(C) Exert strong influence on the behavior of individual members, such as the establishment or maintenance of norms or the enforcement of sanctions to direct or control behavior; or

(D) Organize or influence economic subsistence activities among the members, including shared or cooperative labor.

(ii) The petitioner has met the requirements in § 83.11(b)(2) at a given time.

(d) Governing document. The petitioner must provide:

(1) A copy of the entity's present governing document, including its membership criteria; or

(2) In the absence of a governing document, a written statement describing in full its membership criteria and current governing procedures.

(e) Descent. The petitioner's membership consists of individuals who descend from a historical Indian tribe (or from historical Indian tribes that combined and functioned as a single autonomous political entity).

(1) The petitioner satisfies this criterion by demonstrating that the petitioner's members descend from a tribal roll directed by Congress or prepared by the Secretary on a descendancy basis for purposes of distributing claims money, providing allotments, providing a tribal census, or other purposes, unless significant countervailing evidence establishes that the tribal roll is substantively inaccurate; or

(2) If no tribal roll was directed by Congress or prepared by the Secretary, the petitioner satisfies this criterion by demonstrating descent from a historical Indian tribe (or from historical Indian tribes that combined and functioned as a single autonomous political entity) with sufficient evidence including, but not limited to, one or a combination of the following identifying present members or ancestors of present members as being descendants of a historical Indian tribe (or of historical Indian tribes that combined and functioned as a single autonomous political entity):

(i) Federal, State, or other official records or evidence;

(ii) Church, school, or other similar enrollment records;

(iii) Records created by historians and anthropologists in historical times;

(iv) Affidavits of recognition by tribal elders, leaders, or the tribal governing body with personal knowledge; and

(v) Other records or evidence.

(f) Unique membership. The petitioner's membership is composed principally of persons who are not members of any federally recognized Indian tribe. However, a petitioner may be acknowledged even if its membership is composed principally of persons whose names have appeared on rolls of, or who have been otherwise associated with, a federally recognized Indian tribe, if the petitioner demonstrates that:

(1) It has functioned as a separate politically autonomous community by satisfying criteria in paragraphs (b) and (c) of this section; and

(2) Its members have provided written confirmation of their membership in the petitioner.

(g) Congressional termination. Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship. The Department must determine whether the petitioner meets this criterion, and the petitioner is not required to submit evidence to meet it.

SOURCE: 80 FR 37888, July 1, 2015, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 479a–1; Pub.L. 103–454 Sec. 103 (Nov. 2, 1994); and 43 U.S.C. 1457.

Notes of Decisions (138)

Current through Jan. 11, 2018; 83 FR 1310.

Code of Federal Regulations
Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter F. Tribal Government
Part 83. Procedures for Federal Acknowledgment of Indian Tribes (Refs & Annos)
Subpart B. Criteria for Federal Acknowledgment

25 C.F.R. § 83.12

§ 83.12 What are the criteria for a previously federally acknowledged petitioner?

Effective: July 31, 2015

Currentness

(a) The petitioner may prove it was previously acknowledged as a federally recognized Indian tribe, or is a portion that evolved out of a previously federally recognized Indian tribe, by providing substantial evidence of unambiguous Federal acknowledgment, meaning that the United States Government recognized the petitioner as an Indian tribe eligible for the special programs and services provided by the United States to Indians because of their status as Indians with which the United States carried on a relationship at some prior date including, but not limited to, evidence that the petitioner had:

(1) Treaty relations with the United States;

(2) Been denominated a tribe by act of Congress or Executive Order;

(3) Been treated by the Federal Government as having collective rights in tribal lands or funds; or

(4) Land held for it or its collective ancestors by the United States.

(b) Once the petitioner establishes that it was previously acknowledged, it must demonstrate that it meets:

(1) At present, the Community Criterion; and

(2) Since the time of previous Federal acknowledgment or 1900, whichever is later, the Indian Entity Identification Criterion and Political Authority Criterion.

SOURCE: 80 FR 37888, July 1, 2015, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 25 U.S.C. 2, 9, 479a–1; Pub.L. 103–454 Sec. 103 (Nov. 2, 1994); and 43 U.S.C. 1457.

Notes of Decisions (137)

Current through Jan. 11, 2018; 83 FR 1310.

End of Document

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10537 Santa Monica Blvd. Suite 240, Los Angeles, California 90025.

On January 17, 2018, I served the foregoing documents described as **APPELLANT THE AGUA CALIENTE TRIBE OF CUPEÑO INDIANS OF THE PALA RESERVATION'S OPENING BRIEF** on Counsel for Respondents, Amarveer S. Brar

[X] By Electronic Service: Pursuant to Circuit Rule 25-5, the above referenced document was electronically filed and thus served upon all interested parties via a "Notice of Electronic Filing" ("NEF") that is automatically generated by the CM/ECF system and sent by email to all CM/ECF Users who have consented to receive service through the CM/ECF system. Service with this electronic NEF constitutes service pursuant to the Federal Rules of Appellate Procedure, and the NEF itself will constitute proof of service for individuals so served.

I declare under penalty of perjury under the laws of the State of California and that the foregoing is true and correct.

Executed on January 17, 2018 at Los Angeles, California.

/s/ Andrew W. Twietmeyer
Andrew W. Twietmeyer